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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 16, 2021

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

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OF
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[4]Resigned 31 December 2020. [5]Term ended 31 December 2020. [6]Term ended 31 December 2020. [7]Sworn in 1 January 2021.
[8]Sworn in 1 January 2021. [9]Sworn in 1 January 2021. [10]Sworn in 1 January 2021. [11]Appointed 30 December 2020 and sworn in 6 January 2021.

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COURT OF APPEALS

CASES REPORTED

FILED 15 DECEMBER 2020

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Rule 403 analysis—attorney's offer to cover costs through liability insurance—deed reformation lawsuit—In an action to reform a deed, where the parties negotiated for the sale and purchase of twenty-two out of sixty-two acres of land, but the closing attorney (third-party defendant) inadvertently drafted the deed to convey the entire sixty-two-acre tract, the trial court did not abuse its discretion by excluding evidence of the attorney's offer to pay plaintiffs' legal costs through her liability insurance carrier. Even if the evidence were relevant for a collateral purpose under Evidence Rule 411 (to show bias), any probative value was substantially outweighed by the danger of unfair prejudice or confusion under Rule 403 where it was unclear whether the attorney's offer was to fund plaintiffs' litigation (which she

never did) or to cover the cost of correcting the deed (which she offered to both plaintiffs and defendants). **Maldjian v. Bloomquist, 103.**

Rule 403 analysis—tolling agreement between plaintiffs and third-party defendant—deed reformation lawsuit—In an action to reform a deed, where the parties negotiated for the sale and purchase of twenty-two out of sixty-two acres of land, but the closing attorney (third-party defendant) inadvertently drafted the deed to convey the entire sixty-two-acre tract, the trial court did not abuse its discretion by excluding evidence of the attorney's agreement with plaintiffs tolling the statute of limitations on any claims plaintiffs might have against her. Any probative value of the evidence in showing the attorney's bias was substantially outweighed by the danger of unfair prejudice or confusion, where the attorney offered to enter into a similar tolling agreement with defendants and where her credibility was already attacked throughout trial because of her admitted malpractice in drafting the deed. **Maldjian v. Bloomquist, 103.**

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Speeding to elude arrest—operating a motor vehicle—motion to dismiss—sufficient evidence—In a prosecution for felony speeding to elude arrest where "operating a motor vehicle" was an essential element of the crime and mopeds were specifically excluded from the statutory definition of "motor vehicle", the State presented sufficient evidence of that element to survive defendant's motion to dismiss where the arresting officer, despite repeatedly referring to defendant's vehicle as a moped during his testimony, stated that the vehicle operated by defendant was traveling at 50 mph, and also testified that the definition of "moped" excludes vehicles capable of going over 30 mph. **State v. Boykin, 187.**

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SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 11 and 25

February 8 and 22

March 8 and 22

April 12 and 26

May 10 and 24

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December 13

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CHARLES BLUE, PLAINTIFF
v.
THAKURDEO MICHAEL BHIRO, PA, DIXIE LEE BHIRO, PA,
AND LAUREL HILL MEDICAL CLINIC, P.C., DEFENDANTS

No. COA20-159

Filed 15 December 2020

Civil Procedure—motion to dismiss—matters outside complaint considered—conversion to motion for summary judgment—remand required

In a medical malpractice action, where the trial court considered matters outside the complaint—including memoranda of law and arguments, both of which contained facts not alleged in the complaint—and the court made no attempt to exclude those matters when hearing and then granting defendants' Rule 12(b)(6) motion to dismiss, the court converted the motion to dismiss to a motion for summary judgment pursuant to Rule 56. The court's order was reversed and the matter remanded for the parties to have a reasonable opportunity to gather evidence and present arguments based on that evidence.

Judge HAMPSON dissenting.

Appeal by Plaintiff from Order entered 10 December 2019 by Judge Gale M. Adams in Scotland County Superior Court. Heard in the Court of Appeals 12 August 2020.

Dawson & Albritton, P.A., by Harry H. Albritton, Jr. and Darren M. Dawson, for plaintiff-appellant.

Batten Lee, PLLC, by Gloria T. Becker, for defendants-appellees.

MURPHY, Judge.

When a trial court hears matters beyond the facts in a complaint during a motion to dismiss under Rule 12(b)(6), the motion is converted into a motion for summary judgment under Rule 56. If such a conversion occurs, the parties must be given a reasonable opportunity to present relevant evidence on the motion for summary judgment. The failure to provide a reasonable opportunity to present this evidence requires remand for such an opportunity. Here, the trial court converted the motion to dismiss into a motion for summary judgment without providing the parties a reasonable opportunity to present evidence. We reverse the grant of the purported motion to dismiss and remand for an opportunity for the parties to conduct discovery and present evidence prior to the determination of the motion for summary judgment.

BACKGROUND

Charles Blue ("Blue") filed a *Complaint* alleging medical negligence on the part of Thakurdeo Bhiro, Dixie Bhiro, and Laurel Hill Medical Clinic (collectively "Defendants"). The *Complaint* alleged the following facts: Defendants were Blue's primary medical provider for around 20 years and provided him with generalized care, including preventative medicine. In January 2012, Mr. Bhiro ordered a prostate specific antigen ("PSA") blood test for Blue, which helps to determine the likelihood of someone having prostate cancer. Blue's PSA test result indicated he had 87.9 nanograms per milliliter of PSA enzymes in his blood. Although "[a] PSA of 4 nanograms per milliliter is considered abnormally high for most men and may indicate the need for further evaluation with a prostate biopsy[,]" Defendants did not provide any follow-up care or referrals despite receiving a copy of the test results. On 22 March 2018, Blue had another test indicating his PSA level was 1,763 nanograms per milliliter and soon thereafter was diagnosed with metastatic prostate cancer.

Blue sued Mr. Bhiro and Mrs. Bhiro for negligence in failing to follow up or refer Blue to a specialist after receiving his 2012 PSA test results, alleging as a result of their negligence Blue developed metastasized cancer, and experienced shortened life expectancy, pain, emotional distress, and loss of enjoyment of life. His claims against Laurel Hill Medical Clinic are based on vicarious liability.

Defendants filed a Rule 12(b)(6) motion to dismiss in their Answer on the basis of the statute of limitations. They contended the alleged negligence occurred in January 2012, meaning the three-year statute of limitations had expired prior to Blue bringing the suit. Their Answer also alleged contributory negligence. In response to the allegation of contributory negligence, Blue argued, in his *Reply*, Defendants had the last clear chance to avoid injuring Blue due to their superior knowledge and understanding of the first PSA test, and their continued medical treatment of Blue "for several years after the [2012 PSA test] . . . ."

At the hearing for the motion to dismiss, the parties submitted memoranda of law and orally argued their positions. Blue's memorandum of law and oral arguments included facts not included in his *Complaint*. After Blue discussed some of these facts, Defendants stated "much of which [Blue] has argued is not complained [of] in the [C]omplaint. And, Your Honor -- Or the [R]eply. And so I would just again remind that this is a motion to dismiss. And we're looking at the four corners of the [C]omplaint." Ultimately, "having heard arguments of parties and counsel for the parties and having reviewed the court file, pleadings, and memorandums of law submitted by both parties," the trial court granted Defendants' motion to dismiss.

ANALYSIS

Blue contends the trial court erred in granting Defendants' motion to dismiss pursuant to Rule 12(b)(6) based on the statute of limitations. Blue also contends the motion to dismiss was converted to a motion for summary judgment under Rule 56 due to the consideration of matters outside of the pleadings; whereas, Defendants contend the motion was not converted into a summary judgment motion, and at most was converted to a motion for judgment on the pleadings under Rule 12(c). We hold the motion to dismiss was converted to a motion for summary judgment, requiring remand for a reasonable opportunity to gather and present evidence, and therefore do not address the underlying statute of limitations issue.

A. Motion to Dismiss

As an initial matter, we must determine whether the trial court reviewed the *Complaint* under Rule 12(b)(6), the pleadings under Rule 12(c), or the pleadings and facts outside the pleadings under Rule 56. Although the order granting Defendants' motion to dismiss purported to act under Rule 12(b)(6), it was converted to a motion for summary judgment under Rule 56 by the consideration of matters outside the pleadings. Rule 12(b)(6) and Rule 12(c) read:

> If, on a motion [for judgment on the pleading under Rule 12(b)(6) or pleadings under Rule 12(c)], matters outside the [pleading or pleadings] are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C.G.S. §§ 1A-1, Rule 12(b) & (c) (2019).

The order granting Defendants' motion to dismiss states

> [t]he [c]ourt, *having heard arguments of parties and counsel for the parties* and *having reviewed* the court file, *pleadings*, and *memorandums of law* submitted by both parties, and [sic] finds that [Blue] failed to state a claim upon which relief can be granted and [] Defendants' [m]otion to [d]ismiss should be allowed pursuant to N.C. R. Civ. P. 12(b)(6).

(Emphasis added). According to the terms of the order, the trial court at least considered the pleadings, which would convert the Rule 12(b)(6) motion to a Rule 12(c) motion on the pleadings.

However, the trial court also considered the memoranda of law submitted by the parties and the arguments presented by the parties, both of which contained facts not alleged in the *Complaint*. Blue's memorandum of law opposing the motion to dismiss discussed the following facts not contained in the *Complaint* or *Reply*: "[Blue] complained of urological issues following the elevated [] PSA test"; "[Blue] sought treatment from Defendant[s] in November, 1996 through to January, 2019 for his primary medical concerns which included urological issues[]"; "[Blue] denies any such knowledge [of elevated PSA levels]"; "The evidence will show that [Blue's] last visit with Defendants prior to second PSA test was on [5 March 2018]." Similarly, in the arguments before the trial court on 12 November 2019, Blue alleged the following facts:

> Every time Mr. Blue saw them after that -- We allege he saw them up until January [2019]. And actually he saw them 41 times from '12 to [2019].
>
> . . .
>
> Not until [2018] was another test ordered by a urologist at that time[.]

. . .

> There was an allegation my client knew about the PSA. He had no idea. He didn't know about it until we told him about it. And we found it in the medical records. We gave it to the urologist to help them with the cancer treatment.
>
> No one knew about this PSA. And I didn't allege that in the [C]omplaint. The allegation was he got it on that day. And there was a conversation about prostate cancer on that day. That was it.

Following this information, Defendants stated, "much of which [Blue] has argued is not complained [of] in the [C]omplaint. And, Your Honor -- Or the [R]eply. And so I would just again remind that this is a motion to dismiss. And we're looking at the four corners of the [C]omplaint." Despite this, the trial court never excluded any facts or stated it would not consider matters outside the scope of the pleadings. Nor did the trial court's order granting the motion to dismiss exclude any matters.

"[T]he trial court was not required to convert the Rule 12 motion into one for summary judgment under Rule 56[]" if it is clear the trial court did not consider matters outside of the pleadings. *Privette v. Univ. of N.C. at Chapel Hill*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989); *Estate of Belk ex rel. Belk v. Boise Cascade Wood Prods., L.L.C.*, 263 N.C. App. 597, 599, 824 S.E.2d 180, 183 (2019). Additionally, memoranda of law and arguments of counsel are generally "not considered matters outside the pleading[s] for purposes of converting a Rule 12 motion into a Rule 56 motion." *Privette*, 96 N.C. App. at 132, 385 S.E.2d at 189 (citations and internal marks omitted). Despite this, the consideration of memoranda of law and arguments of counsel can convert a Rule 12 motion into a Rule 56 motion if the memoranda or arguments "contain[] any factual matters not contained in the pleadings." *Privette*, 96 N.C. App. at 132, 385 S.E.2d at 189; *Brantley v. Watson*, 113 N.C. App. 234, 237, 438 S.E.2d 211, 212-213 (1994) ("Because the trial judge heard evidence in the form of oral arguments and undisputed facts from counsel, this Rule 12(b)(6) was converted into a Rule 56 motion for summary judgment."); *Erie Ins. Exch. v. Builders Mut. Ins. Co.*, 227 N.C. App. 238, 243-44, 742 S.E.2d 803, 809 (2013) ("Having reviewed the briefs submitted by the parties at the hearing below, we agree with [the] plaintiffs that the briefs are simply memoranda of points and authorities and contain no factual allegations outside of those presented in the complaint. Thus, the trial court's consideration of the parties' briefs in the present case did not convert [the] plaintiffs' Rule 12(c) motion into a Rule 56 motion for summary judgment.").

Here, nothing indicates the trial court did not consider the facts presented beyond the pleadings. Instead, the terms of the order indicate the trial court considered matters beyond the pleadings in considering the arguments of the parties and reviewing memoranda of law. Although Defendants informed the trial court the facts went beyond those in the *Complaint*, the trial court never excluded any facts at the hearing or in the terms of the order. The failure to exclude the matters that went beyond the facts contained in the *Complaint* converted the motion to dismiss into a motion for summary judgment under Rule 56.

When a Rule 12 motion is converted into a Rule 56 motion "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." N.C.G.S. §§ 1A-1, Rule 12(b) & (c) (2019). Here, because the trial court did not recognize the conversion of the Rule 12 motion into a Rule 56 motion, no such opportunity was given to the parties. In particular, Defendants strictly adhered to the evidentiary constraints of Rule 12 and attempted to keep the motion restricted to allegations in the *Complaint*; whereas, Blue presented matters beyond the Rule 12 evidentiary limitations. In the absence of a reasonable opportunity for the parties to gather and present pertinent evidence for a Rule 56 motion, it would be improper for us to make a determination of the statute of limitations issue on the current evidence because "we believe that such a determination cannot properly be made at the present time in light of the incomplete factual record that currently exists." *See Premier, Inc. v. Peterson*, 232 N.C. App. 601, 610, 755 S.E.2d 56, 62 (2014).

Due to the lack of a reasonable opportunity for the parties, and particularly Defendants, "to present all material made pertinent to such a motion by Rule 56[]" we reverse the trial court's order granting Defendants' motion to dismiss and remand "so as to allow the parties full opportunity for discovery and presentation of all pertinent evidence." *Kemp v. Spivey*, 166 N.C. App. 456, 462, 602 S.E.2d 686, 690, (2004) (citing N.C.G.S. § 1A-1, Rule 12(b) (2004)).

B. Blue's Request to Amend the Complaint

At the hearing, Blue stated "if Your Honor does not believe I included enough factual information in the [C]omplaint, we'd request leave to amend the [C]omplaint [to include more facts]." The trial court took the matter under advisement, but otherwise did not address this motion to amend at the hearing or in its order granting the motion to dismiss. Now on appeal, Blue argues "[i]f [we are] inclined to agree with the trial court in that [Blue's] Complaint, on its face, does not allege sufficient facts to establish a claim for medical negligence that is not barred by the statute

of limitations," then he should have been able to amend his *Complaint*. Since we reverse the trial court's motion to dismiss order, without agreeing or disagreeing with the trial court's underlying action, the contingency referred to—our agreement with the grant of the motion to dismiss—has not occurred and we do not reach this issue. N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs.").

CONCLUSION

The trial court converted Defendants' motion to dismiss under Rule 12 into a motion for summary judgment under Rule 56, but failed to provide the parties a reasonable opportunity to present evidence for resolution of the motion for summary judgment. We reverse the order granting the purported motion to dismiss and remand for a reasonable opportunity to gather and present evidence on a motion for summary judgment.

REVERSED AND REMANDED.

Judge YOUNG concurs.

Judge HAMPSON dissents with separate opinion.

HAMPSON, Judge, dissenting.

In my view, the trial court's Order should be affirmed. I reach this conclusion for three reasons: (I) the trial court's recitation it considered pleadings, memoranda, and arguments of the parties did not necessarily require converting Defendants' Motion to Dismiss to a Summary Judgment Motion or a Motion for Judgment on the Pleadings; (II) the trial court properly granted Defendants' Rule 12(b)(6) Motion to Dismiss on the basis Plaintiff's Complaint was time-barred; and (III) the trial court did not abuse its discretion in not ruling on Plaintiff's oral request for leave to amend the Complaint made at the conclusion of the hearing as a request for alternative relief in the event the trial court deemed Plaintiff's allegations insufficient to survive a Motion to Dismiss. For these reasons, I respectfully dissent.

I.

First, the trial court's recitation in its Order Granting Defendants' Motion to Dismiss that it "heard arguments of parties and counsel for the parties and . . . reviewed the court file, pleadings, and memorandums of law submitted by both parties" did not necessarily require converting

the Motion to Dismiss brought under Rule 12(b)(6) into a Motion for Summary Judgment. *See Carlisle v. Keith*, 169 N.C. App. 674, 688, 614 S.E.2d 542, 551 (2005). Although it is true the parties—and in particular, Plaintiff—may have included in both written and/or oral argument before the trial court additional arguments on what the evidence might show, references to additional pleadings, or facts not alleged in the Complaint, these were merely arguments of counsel. No evidentiary materials—discovery, exhibits, affidavits, or the like—were offered or submitted to the trial court. There is no indication the trial court, in fact, considered any extraneous evidentiary materials in its ruling or based its decision on anything other than the allegations made in the Complaint. *See id.*; *see also Privette v. University of North Carolina*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989) ("Memoranda of points and authorities as well as briefs and oral arguments . . . are not considered matters outside the pleading for purposes of converting a Rule 12 motion into a Rule 56 motion" (citation and quotation marks omitted)).

II.

Second, in any event, the trial court properly allowed the Motion to Dismiss under Rule 12(b)(6). In reviewing a trial court's dismissal under Rule 12(b)(6), this Court conducts "a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673-74 (2003). "A statute of limitations or repose defense may be raised by way of a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994) (citations omitted). "Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citation omitted).

Here, Plaintiff's Complaint alleges Defendants ordered a PSA test for Plaintiff on 24 January 2012, which showed Plaintiff had an elevated PSA level; however, Defendants failed to provide any follow-up care or referrals as a result of this test. Plaintiff further alleged his PSA levels were tested again on or about 22 March 2018. Plaintiff does not allege who ordered this new test. The March 2018 test revealed a much higher PSA level and soon after Plaintiff was diagnosed with metastatic prostate cancer. Plaintiff did not file suit until 17 June 2019.

Generally, medical malpractice claims are subject to the three-year statute of limitations for personal injury actions in N.C. Gen. Stat.

§ 1-52(16). N.C. Gen. Stat. § 1-52(16) (2019). However, relevant to this case, N.C. Gen. Stat. § 1-15(c) provides in medical malpractice actions:

> a cause of action for malpractice arising out of the performance of or failure to perform professional services *shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made*: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. *Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]*

N.C. Gen. Stat. § 1-15(c) (2019) (emphasis added).

Plaintiff repeatedly argues on appeal Defendants never made him aware of the results of the January 2012 PSA test. Plaintiff, however, did not make such an allegation in his Complaint. Nevertheless, assuming Plaintiff was not made aware of the test results in 2012 or, further, that the significance of these test results was not readily apparent, and, even further, that Plaintiff reasonably should not have discovered the elevated PSA levels until two or more years after the January 2012 testing, Plaintiff's Complaint is, on its face, time-barred under N.C. Gen. Stat. § 1-15(c).

This is so for two reasons. First, Plaintiff's Complaint alleges Plaintiff discovered the injury in March 2018, when the subsequent PSA test was performed. Plaintiff, however, did not file his Complaint until June 2019, more than one year from discovery of the injury. Perhaps more to the point, there is no allegation in the Complaint that Plaintiff did not, in fact, discover the injury on or after June 2018 rendering the Complaint timely filed in June 2019. Second, Defendants' negligent act occurred in 2012 and suit was, again, not filed until 2019. This is more than four

years from the negligent act. Thus, the suit is time-barred under N.C. Gen. Stat. § 1-15(c).

Plaintiff, however, argues the Complaint alleges a continuing course of treatment by Defendants through January 2019. Therefore, Plaintiff contends the last act of the Defendants giving rise to the cause of action did not occur until January 2019, at which time the action accrued. Thus, in Plaintiff's view, his Complaint was not time-barred under N.C. Gen. Stat. § 1-15(c).

"The 'continuing course of treatment' doctrine has been accepted as an exception to the rule that 'the action accrues at the time of the defendant's negligence.' " *Stallings v. Gunter*, 99 N.C. App. 710, 714, 394 S.E.2d 212, 215 (1990) (citation omitted). "According to this doctrine, the action accrues at the conclusion of the physician's treatment of the patient, so long as the patient has remained under the continuous treatment of the physician for the injuries which gave rise to the cause of action." *Id.* "To take advantage of the continuing course of treatment doctrine, plaintiff must show the existence of a *continuing* relationship with his physician, and . . . that he received *subsequent* treatment from that physician." *Id.* at 715, 394 S.E.2d at 216 (citation and quotation marks omitted). "Mere continuity of the general physician-patient relationship is insufficient to permit one to take advantage of the continuing course of treatment doctrine." *Id.*

Here, Plaintiff alleges only that Defendants "continued as Plaintiff's primary medical care providers until January 2019." There is no allegation, however, Plaintiff actually received any subsequent treatment from Defendants. Thus, Plaintiff has alleged only "[m]ere continuity of the general physician-patient relationship[,]" which is insufficient to invoke the continuing course of treatment doctrine. *Id.* Thus, on the face of the Complaint, Plaintiff's claims against Defendants are time-barred under N.C. Gen. Stat. § 1-15(c). Consequently, the trial court did not err in dismissing Plaintiff's Complaint under Rule 12(b)(6). *See Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970) ("If the complaint discloses an unconditional affirmative defense which defeats the claim asserted or pleads facts which deny the right to any relief on the alleged claim it will be dismissed.").

III.

Third, and finally, the trial court did not abuse its discretion by failing to permit Plaintiff to amend the Complaint. Plaintiff did not file a written motion to amend the Complaint, but rather, towards the conclusion of the hearing, orally requested: "And if Your Honor does not believe

I included enough factual information in the complaint, we'd request leave to amend the complaint[.]" It is not clear this issue is even properly before us, as Plaintiff did not obtain any ruling on his oral request. *See* N.C.R. App. P. 10(a)(1) (2020). Even assuming the trial court's dismissal of the Complaint automatically constitutes a denial of the oral request for leave to amend the Complaint, as Plaintiff contends, Plaintiff's oral request was insufficient to require the trial court to permit amendment of the Complaint. *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 486, 593 S.E.2d 595, 602 (2004) ("plaintiffs' oral offer that they 'would be willing to amend the petition and get more facts' at the Rule 12(b)(6) hearing is not a sufficient request for leave to amend").

Accordingly, for the foregoing reasons, the trial court's Order should be affirmed.

IN THE MATTER OF A.J.L.H., C.A.L.W., M.J.L.H.

No. COA20-267

Filed 15 December 2020

1. Child Abuse, Dependency, and Neglect—adjudication of neglect and abuse—father's appeal—standing only as to biological daughter

A father had standing to appeal from an order adjudicating his biological daughter as neglected, but not to appeal from the order adjudicating his two stepchildren neglected and abused, since he was not the legal or putative father of either of those children.

2. Child Abuse, Dependency, and Neglect—adjudication of neglect and abuse—hearsay—child's out-of-court statement—no exception—findings unsupported

In a child neglect and abuse adjudication matter regarding three children, several of the trial court's findings of fact were not supported by competent evidence to the extent they were based on hearsay consisting of out-of-court statements attributed to one of the children where there was no indication the declarant was unavailable to testify, and the statements were inadmissible pursuant to any hearsay exception. Other findings were erroneous for not being supported by any evidence at all.

3. Child Abuse, Dependency, and Neglect—abuse—serious physical injury—sufficiency of evidence

There was no clear and convincing evidence to support a trial court's conclusion that a child was abused where the parents' discipline—which consisted of spanking that resulted in temporary marks on the child, making the child stand in a corner for a long time or on one leg while doing homework, or having her sleep on the floor as a punishment—did not constitute serious physical injury pursuant to N.C.G.S. § 7B-101.

4. Child Abuse, Dependency, and Neglect—abuse—grossly inappropriate procedures—hearsay—out-of-court statement

The trial court's adjudication of a child as abused was not supported by competent evidence where it was based on an out-of-court statement that was made by the child to a social worker that her mother tried to choke her, because the statement constituted inadmissible hearsay and no other evidence was presented that the child was subjected to grossly inappropriate procedures pursuant to N.C.G.S. § 7B-101.

5. Child Abuse, Dependency, and Neglect—neglect—sufficiency of evidence to support findings

The trial court's adjudication of a child as neglected was vacated where the court's findings were based on inadmissible evidence, including hearsay. The matter was remanded for a new hearing and for the court to make findings of fact based on competent, admissible evidence.

6. Child Abuse, Dependency, and Neglect—neglect—harm or risk of harm—lack of evidence

In a child abuse and neglect case where one child in the home was alleged to have been subjected to inappropriate discipline, the adjudication of the child's two siblings as neglected was reversed for lack of supporting evidence that the children had been harmed or were at risk of being harmed. The trial court was directed to dismiss the petitions and return the two children to their parents' care.

7. Child Abuse, Dependency, and Neglect—disposition order—complete denial of visitation—abuse of discretion

In an abuse and neglect matter, the trial court abused its discretion in denying respondent-parents any visitation with their three children where the court's adjudication of one child as abused and of all three children as neglected was based on incompetent and

inadmissible evidence. The disposition order was vacated and the matter remanded for a new order on visitation.

Appeal by respondents from order entered 13 December 2019 by Judge Tonia A. Cutchin in Guilford County District Court. Heard in the Court of Appeals 17 November 2020.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Social Services.

Benjamin J. Kull for respondent-father appellant.

Tin, Fulton, Walker & Owen, PLLC, by Cheyenne N. Chambers, for respondent-mother appellant.

TYSON, Judge.

Respondent-mother and Respondent-stepfather (collectively "Respondents") appeal from the trial court's adjudication and disposition order. Respondents argue the trial court erred by adjudicating their minor children, Margaret, age ten, Chris, age four, and Anna, age one, as abused and neglected, and by prohibiting visitation. *See* N.C. R. App. P. 42(b) (permitting the use of pseudonyms to protect the identity of the child throughout the opinion). Respondents are the biological parents of Anna. Respondent-stepfather is stepfather to Respondent-mother's daughters, Margaret and Chris, born of previous relationships.

We vacate the adjudications of abuse and neglect and remand. We also vacate the disposition order regarding Chris and Anna and dismiss the petitions and remand for entry of an order to provide Respondents visitation with Margaret.

I. Background

Guilford County Department of Health and Human Services ("GDHHS") received a report on 21 May 2019 alleging then nine-year-old Margaret had been disciplined with a belt, which had left marks on her skin. Social worker, Lisa Joyce ("Joyce") was assigned to investigate. On 22 May 2019, another report was filed of a new injury the size of a silver dollar on Margaret's upper back. Joyce testified Margaret was hiding under a desk when she arrived to interview her and asserted Margaret did not want to go home because they "were going to hurt her."

Respondent-mother acknowledged she had disciplined Margaret for lying and being untruthful about following directions, by having her

inter alia, sleep upon the floor, allowing her to eat only crunchy peanut butter sandwiches, having her stand in the corner at home for long periods, prohibiting her from watching TV or playing outside, and by having Respondent-stepfather discipline her by using corporal punishment. Respondent-mother explained the marks were accidental, because Margaret had moved around a lot and the belt meant for her buttocks had landed on her back. Joyce informed Respondent-mother that GDHHS felt the discipline was "a little bit extreme." Respondents immediately agreed to a safety plan. The plan placed Margaret with her maternal grandparents, but left Chris and Anna in the home in Respondents' care.

During her investigation, Joyce received two reports from Randolph County Department of Social Services ("RDSS") filed during 2015 and 2017, involving Respondent-mother. Respondent-mother had also been charged with misdemeanor child abuse and Respondent-stepfather had been charged with assault on a child under the age of twelve stemming from the actions related to the present petition. Respondents' charges were pending at the time of this order on appeal.

On 8 August 2019, GDHHS held a Child and Family Team meeting. At the meeting, GDHHS decided to petition for custody of all three children, even though GDHHS had gathered all relevant family history information in May and all home visits with the intact family from May through August had revealed no concerns. GDHHS case workers had made multiple home visits. No new or ongoing concerns were raised or noted. The safety plan was never violated.

During adjudication, Joyce testified the decision resulted from "information learned during the assessment," RDSS records received in May; and GDHHS' disagreement with Respondents "admitting that they did not feel . . . their disciplinary measures and actions were unusual or cruel."

On 9 August 2019, GDHHS filed juvenile petitions alleging Margaret was abused and neglected. Her siblings, four-year-old Chris, and one-year-old, Anna, were alleged to be neglected. The court determined a need for GDHHS to take nonsecure custody of all three children.

At the filing of the petition, Margaret remained in an out-of-home kinship placement with her maternal grandparents and Chris and Anna remained at home with Respondents. Subsequently Margaret was moved to foster care and then was moved into the home of her maternal grandmother by court order, and Chris and Anna were removed from Respondents' home and to foster care.

The adjudication and disposition hearing was held on 8 November 2019. By order entered 13 December 2019, the court concluded Margaret was an abused juvenile and all three children were neglected. The court denied Respondents any visitation with the children. Respondents timely appealed.

II. Jurisdiction

Jurisdiction lies in this Court from an appeal of the adjudication and disposition order pursuant to N.C. Gen. Stat. § 7B-1001(a)(3) (2019).

III. Issues

Respondents argue the trial court erred by: (1) admitting hearsay evidence, (2) adjudicating Margaret abused and neglected, and Chris and Anna neglected and (3) arbitrarily denying Respondents any visitation with all three children.

IV. Respondent-stepfather's Standing

[1] Margaret, Chris, and Anna are children of different biological fathers. Respondent-stepfather is not the legal or putative father of Margaret or Chris. Respondent-stepfather is the biological father of Anna. Only Respondent-stepfather is a party to this appeal. This Court has made a distinction between a parent and stepparent.

> N.C. Gen. Stat. § 7B-101(8) defines caretaker as a person other than a parent, guardian, or custodian who is responsible for the health and welfare of a juvenile, and specifies that this term includes a stepparent. N.C. Gen. Stat. § 7B-1002(4) does not authorize an appeal by a stepparent in the absence of record evidence that the stepparent has become the child's parent through adoption or is otherwise qualified under the statute.

In re M.S., 247 N.C. App. 89, 93-94, 785 S.E.2d 590, 593 (2016) (alternations, citations, and internal quotations omitted). Respondent-stepfather has standing to appeal only on behalf of his biological daughter, Anna. He has no standing to appeal the order regarding either Margaret or Chris.

V. Analysis

A. Parental Rights

> We have long recognized that the [Fourteenth] Amendment's Due Process Clause, like its Fifth Amendment counterpart, guarantees more than fair process. The Clause also

> includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.

Troxel v. Granville, 530 U.S. 57, 65, 147 L. Ed. 2d 49, 56 (2000) (alterations, internal citations and quotation marks omitted). The Supreme Court of the United States also held "the liberty protected by the Due Process Clause includes the right of parents to establish a home and bring up children and to control the education of their own." *Id.*

Both of the holdings in *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551 (1972) and *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599 (1982) also demonstrate that under fundamental common law and Constitutional protections, "the parents' right to retain custody of their child and to determine the care and supervision suitable for their child, is a 'fundamental liberty interest' which warrants due process protection." *In re Montgomery*, 311 NC 101, 106, 316 S.E.2d 246, 250 (1984).

> [T]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations . . . . there is a constitutional dimension to the right of parents to direct the upbringing of their children. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the [S]tate can neither supply nor hinder.

Troxel, 530 U.S. at 65, 147 L. Ed. 2d at 56.

B. Hearsay Evidence

[2] The North Carolina Constitution and General Statutes mandate the trial court must protect the due process and parental rights of the juvenile's parent and of the juvenile throughout the adjudicatory hearing. N.C. Gen. Stat. § 7B-802 (2019). "Where the juvenile is alleged to be abused, neglected, or dependent, the rules of evidence in civil cases shall apply." N.C. Gen. Stat. § 7B-804 (2019).

Respondents assert inadmissible and prejudicial hearsay was admitted at the hearing. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence

to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2019) (internal quotation marks omitted). "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2019).

1. Hearsay Exceptions

Hearsay may be admissible if the statement meets the requirement of a statutory exception. "A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity." N.C. Gen. Stat. § 8C-1, Rule 801(d) (2019).

2. Inadmissible Hearsay

Margaret did not appear nor testify at the hearing. Nothing in the record shows she was unavailable as a witness. Respondents assert findings of fact 12-15 of the adjudication and disposition order are based on inadmissible and prejudicial hearsay and repeat parts of GDHHS' petition's allegations *verbatim*.

Findings of facts 12 and 13 relayed the reports made to Child Protective Services (CPS) asserting Margaret had bruises on 21 May 2019, and new bruises on 22 May 2019. Margaret did not want to state who had disciplined her. GDHHS points out these findings are intended as recitations of historical accounts of the background events leading up to the filing of the juvenile petition.

Respondents assert finding of fact 14 and portions of finding 15 rest upon hearsay. Respondents assert Margaret's out-of-court statements were inadmissible hearsay. The trial court found:

> 14. On May 22, 2019, [Joyce] interviewed [Margaret] . . . [Margaret] informed . . . Joyce that she got up early after Respondent-stepfather, went to work . . . She said that she did not know if she missed the bus, so she started walking to school . . . [Margaret said] the neighbor took her to school . . . [and] she was afraid to go home yesterday because she took (sic) her head wrap off because it was hurting her. Margaret stated that her mother told her if she took her head wrap off, she would get a whipping . . . She said that the marks on her back were from getting a whipping from her stepfather, who whipped her with a belt buckle . . . She said normally she gets whipped on her legs and back . . . marks are left every time. . . . [Joyce] observed the juvenile had marks on her lower back and a mark near her neck area.

> 15. . . . . She was told that [Margaret] was afraid to go home and that there were marks on her back from physical discipline. [Respondent-mother] confirmed that she did physically discipline [Margaret] by whipping her and [Respondent-stepfather] also physically disciplined her because of her lying. [Respondent-mother] stated that the bruises were an accident (sic) because [Margaret] was moving around while [Respondent-stepfather] was trying to discipline her. She confirmed that she disciplines [Margaret] by making her eat crunchy peanut butter sandwiches as a form of punishment for lying because [Margaret] does not like crunchy peanut butter sandwiches. [Respondent-mother] further stated that she takes the juvenile's bed privileges away for lying, and she stands in the corner from 3:30pm until dinner-around 6:00pm, then after eating she makes the juvenile stand in the corner until time to go to bed at 8:00pm; the juvenile has to sleep on the floor. [Respondent-mother] indicated that these disciplinary acts are used when the juvenile lies; however, that did not normally occur every day, but had been occurring every day lately. She indicated that [Margaret] had been lying about her headwrap. [Respondent-mother] stated that [Margaret's] hair is hard to manage, and she makes her wear a headwrap to keep from pulling at her hair. She informed [Joyce] that she did not see anything wrong with her means of discipline. [Joyce] informed [Respondent-mother] that the Department could not condone her disciplinary practices[.]

At adjudication, Respondents objected to the introduction of hearsay evidence eleven times. Ten of those objections were overruled without any finding or ruling on a proper hearsay exception to allow their admission. Here, the issues are whether abuse and neglect of the minor children had occurred. Respondents assert the trial court's findings on the alleged abuse are based upon out-of-court statements offered to prove the matter asserted and these statements did not meet any exception to be admitted.

The findings of fact rely upon out-of-court statements used to prove the truth of purported abuse and neglect of Margaret and piggyback those inadmissible hearsay statements to show purported neglect of Chris and Anna. No competent evidence whatsoever was presented to support the purported finding that Margaret was afraid to go home or fearful of retaliation.

GDHHS argues both respondents admitted to the details Margaret shared about their discipline. As such, GDHHS asserts the Respondents' statements are permitted as admissions of a party-opponent pursuant to N.C. Gen. Stat. § 8C-1, Rule 801 (permitting hearsay if a statement is offered against a party and it is his own statement).

Respondents' statements may be admissible as a statement by a party opponent pursuant to N.C. Gen. Stat. § 8C-1, Rule 801(d). However, finding 14 is replete with the out-of-court statements purportedly made by Margaret to Joyce. Margaret was not found to be unavailable as a witness. GDHHS never argued any hearsay exception applied to prevent Margaret from appearing and testifying as a witness based upon her age, competency, or otherwise.

Finding of fact 14 and portions of finding of fact 15 are based upon inadmissible hearsay statements attributed to Margaret. These findings are erroneous and unsupported by clear and convincing evidence.

Here, the trial court's finding that GDHHS had asserted inappropriate discipline of Margaret is arguably supported by Respondents' statements, to overcome the prejudice of incompetent evidence. *See In re McMillon*, 143 N.C. App. 402, 411, 546 S.E.2d 169, 175 (holding the admission of incompetent evidence is not prejudicial where there is other competent evidence to support the district court's findings), *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

C. Remaining Findings of Fact

Respondents assert that two sentences of finding of fact 17 are unsupported. Respondents assert no evidence identifies the names of all attendees at the Child and Family Team meeting or that Respondents had required Margaret to do her homework on one leg. GDHHS concedes no evidence supports the challenged statements. These two statements of finding of fact are unsupported by any evidence.

Respondent-mother also challenges finding of fact 20 that she has an extensive CPS history in Randolph County and Guilford County. Finding of fact 20 lists three previous reports involving Margaret. Respondent-mother argues finding 20 details GDHHS' process and is hearsay and cannot be used for the truth of the matter asserted.

GDHHS argues these reports are permitted pursuant to N.C. Gen. Stat. § 8C-1 Rule 803(6) (business records of regularly conducted activity are not excluded by the hearsay rule). A business record may be admitted when:

> [A] proper foundation . . . is laid by . . . a witness who is familiar with the . . . records and the methods under which they were made so as to satisfy the court that . . . the sources of information, and the time of preparation render such evidence trustworthy.

In re S.D.J., 192 N.C. App. 478, 482, 665 S.E.2d 818, 821 (2008).

At the adjudication, Joyce testified to the proper foundation of receipt of these records and Respondent-mother's records in Randolph County fall within the business records exception to the hearsay rule. Respondent-mother's challenge to this finding is overruled.

Findings 23 and 24 are the alleged criminal histories of Margaret's and Chris' putative fathers, but no records were provided or presented to the court to support these findings. These criminal histories are presumably presented to prove the children are neglected by proxy, by actions of non-party "caretaker[s] [who do] not provide proper care, supervision, or discipline . . . or who lives in an environment injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15)(ii) (2019). Findings 23 and 24 are irrelevant as neither of these men are parties in the appeal before us.

Finding 26 states Respondent-stepfather did not believe the disciplinary actions were inappropriate, and he never disclosed he would not discipline Chris and Anna in the same manner he had disciplined Margaret. Finding 26 is an arbitrary presumption of a forecast of how Respondent-stepfather may discipline Chris and Anna in the future and is unsupported by testimony or other evidence.

The statements and hearsay which support findings of fact 14, 17, 23-24 and 26 were improperly allowed. Findings 15 and 20 are based upon hearsay but may be properly admitted with proper foundations under established exceptions.

D. Abuse and Neglect

1. Standard of Review

> The role of this Court in reviewing a trial court's adjudication of neglect and abuse is to determine whether the findings of fact are supported by clear and convincing evidence, and whether the legal conclusions are supported by the findings of fact. If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary.

In re T.H.T., 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (alterations, internal citations and quotation marks omitted).

2. Juvenile Code

An abused juvenile is one whose parent "inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means [or] creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means." N.C. Gen. Stat. § 7B-101(1)(a)-(b) (2019). A neglected juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15).

"In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252.

"In order to adjudicate a juvenile neglected, our courts have additionally required that there be some physical, mental, or emotional impairment of the juvenile or a *substantial risk of such impairment* as a consequence of the failure to provide proper care, supervision, or discipline." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (emphasis supplied).

3. Margaret

a. Serious Physical Injury

[3] GDHHS alleged and asserted Margaret had suffered "serious physical injury by other than accidental means" or faced "a substantial risk" of suffering it. N.C. Gen. Stat. § 7B-101(1)(a)-(b). GDHHS provided evidence tending to show: (1) Joyce observed marks on Margaret's lower back and a mark near her neck, and (2) Respondent-mother admitted the bruises were an accident prompted by Margaret's movement while being disciplined with a belt.

This Court, when determining whether a "serious physical injury" exists in the context of an abuse adjudication, has held "the nature of the injury is dependent on the facts of each case." *In re L.T.R.*, 181 N.C. App. 376, 383, 639 S.E.2d 122, 126 (2007).

This Court has previously and repeatedly declined to find spanking that resulted in a temporary bruise constitutes abuse. *See Scott v. Scott*, 157 N.C. App. 382, 387, 579 S.E.2d 431, 435 (2003) (no conclusive

evidence of abuse where spanking with a belt left temporary red marks on child's back and buttocks).

This Court is bound by these precedents. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). No evidence was presented to show Margaret suffered anything other than temporary marks or bruising from the spanking. The evidence and findings mandate the same conclusion here that spanking with temporary marks and bruises are not "serious physical injury" under the statute to support an adjudication of abuse. N.C. Gen. Stat. § 7B-101.

Clear and convincing evidence must support a finding and conclusion that Margaret suffered or will suffer "serious physical injury" to support an adjudication of abuse or neglect under either the statute or our precedents. *Scott*, 157 N.C. App. at 387, 579 S.E.2d at 435. Presuming the juvenile was corporally punished, forced to eat crunchy peanut butter sandwiches, stand in the corner for a lengthy time or upon one leg while doing homework, or sleep upon the floor as punishments for lying, none of those actions, standing alone or taken together, are sufficient to show clear and convincing evidence of abuse or neglect.

b. Grossly Inappropriate Procedures

[4] The Juvenile Code includes in its definition of abuse that the parent "uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior." N.C. Gen. Stat. § 7B-101(1)(c) (2019).

The trial court received into evidence the Guardian *ad Litem's* exhibit number one, a letter purportedly written by Margaret stating she wanted to stay with her grandmother, and "only once my mom tried to choke me." As noted above, Margaret was not found to be unavailable and was not called as a witness. "[P]recedent requires that the trial court enter sufficient findings of fact to support its conclusion of unavailability." *In re B.W.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2020 WL 6733479, at *5 (2020); *see also State v. Fowler*, 353 N.C. 599, 610, 548 S.E.2d 684, 693 (2001); *State v. Clonts*, 254 N.C. App. 95, 115, 802 S.E.2d 531, 545, *aff'd*, 371 N.C. 191, 813 S.E.2d 796 (2018).

No argument was asserted that a hearsay exception applied to prevent her from appearing and testifying as a witness based on her age or competency. This exhibit is inadmissible hearsay presented to prove the truth of a matter asserted in the form of a purported letter from Margaret addressed to the trial court. This letter is inadmissible hearsay and should not have been received into evidence.

Inadmissible hearsay cannot support a finding and certainly is not clear and convincing evidence to show Margaret had been choked or subjected to "cruel or grossly inappropriate" discipline by Respondents. N.C. Gen. Stat. § 7B-101(1)(c). *See Rholetter v. Rholetter*, 162 N.C. App. 653, 656-61, 592 S.E.2d 237, 239-42 (2004).

While the trial court's remaining findings which are supported by competent, admissible evidence contain discussion of other alleged disciplinary measures imposed upon Margaret, it is also apparent the trial court's abuse adjudication is heavily reliant and intertwined with its findings based on inadmissible evidence. Consequently, we vacate the adjudication of Margaret as an abused juvenile and remand this matter for a new hearing at which the trial court should make findings on properly admitted clear and convincing evidence and make new conclusions of whether Margaret is an abused juvenile under the statute.

c. Neglect of Margaret

[5] Based on the same findings, the trial court also adjudicated Margaret as a neglected juvenile. This adjudication of neglect was also a product of the trial court's reliance, in significant part, on its findings based on inadmissible evidence. We also vacate the adjudication of Margaret as a neglected juvenile and remand the matter to the trial court for a new hearing following which the trial court should make findings of fact supported by competent, admissible evidence found to be clear and convincing and, further, to make a new conclusion whether or not Margaret is a neglected juvenile.

4. Neglect of Chris and Anna

[6] Respondents argue Chris and Anna are not neglected juveniles because there was no indication they had ever been harmed or were at any risk of harm. Standing alone, the unsupported adjudication of abuse of Margaret cannot support adjudications for her younger siblings in the absence of evidence of their neglect.

> [I]n determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home . . . . [T]he fact of prior abuse, *standing alone*, is not sufficient to support an adjudication of neglect. Instead, this Court has generally required the presence of other factors to suggest that the neglect or abuse will be repeated.

In re J.C.B., 233 N.C. App. 641, 644, 757 S.E.2d 487, 489 (2014) (emphasis supplied) (internal quotation marks and citations omitted).

Nothing in the record indicates Chris or Anna had been harmed or were at risk of being harmed. Joyce testified there were no concerns with Chris or Anna while they had remained in Respondents' care. The trial court concluded Chris and Anna were neglected based solely on its conclusion Margaret was purportedly abused and neglected. We reverse the trial court's conclusion that Chris and Anna are neglected juveniles and dismiss those petitions.

VI. Dispositional Order

A. Standard of Review

A dispositional order is reviewed for abuse of discretion. "[A]buse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re T.N.G.*, 244 N.C. App. 398, 408, 781 S.E.2d 93, 100 (2015) (quotation omitted). Dispositional findings must be supported by competent evidence. *In re B.C.T.*, 265 N.C. App. 176, 185, 828 S.E.2d 50, 57 (2019). "The court may prohibit visitation or contact by a parent when it is in the juvenile's best interest consistent with the juvenile's health and safety." *In re J.L.*, 264 N.C. App. 408, 421, 826 S.E.2d 258, 268 (2019).

B. Visitation Prohibition

[7] The trial court concluded GDHHS had "made reasonable efforts to prevent the assumption of custody of the juveniles" pursuant to N.C. Gen. Stat. § 7B-903(a)(3). This conclusion was based upon GDHHS' interview with Margaret, contact with formerly involved police departments, contact with the school and interviews with the Respondent-mother and Respondent-stepfather.

Based on those factors, the trial court denied Respondents *any contact* with any of their children. Anna was eight months-old when this order was filed, and she spent her first birthday apart from her parents. Chris was not yet four when the order denying visitation was filed. This lack of contact occurred despite the absence of *any evidence* to support Chris or Anna had been abused or neglected.

The trial court concluded it was in the children's best interest, consistent with their health and safety, for them to be denied any visitation with their parents, relying on incompetent and inadmissible evidence concerning Margaret presented during adjudication. The trial court failed to follow North Carolina statutes, and the rules of evidence. Further, the court abused its discretion by denying any contact between the children and their mother and Anna with her father. The court abused its discretion by making an unsupported finding it is in "the best interest of the

juvenile consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905.1(a) (2019).

We vacate the prohibition of visitation and remand to the trial court to order generous and increasing visitation between Margaret and her mother. *See* N.C. Gen. Stat. § 7B-905.1(b) (2019) (permitting the court to arrange visitation by court order). The dispositional no contact order for Chris and Anna is vacated and those petitions are dismissed.

VII. Conclusion

Respondent-stepfather maintains standing to challenge the finding and conclusions regarding his daughter, Anna. The trial court failed to follow the rules of evidence regarding inadmissible hearsay evidence and used unsupported findings of fact to sustain findings 12-14, 17, 23-24 and 26, which do not support its conclusions. The trial court failed to properly find and conclude Chris and Anna were abused and neglected. Further, the trial court failed to admit or find clear and convincing evidence that the discipline of Margaret rose to the level of a "serious physical injury" as a result of the corporal punishment or other means of parental discipline.

We vacate the adjudication and disposition order and remand for dismissal of the petitions concerning Chris and Anna. Chris and Anna are to be immediately returned to their mother and stepfather.

We also vacate the denial of visitation for Respondent-mother and remand for entry of an order of increasing visitation for Respondent-mother and Margaret. Any new hearing on remand must be conducted in accordance with the Constitutional and due process rights of the Respondents as parents, including live testimony of witnesses in the absence of a supported finding of unavailability in accordance with, the applicable statutes, the rules of evidence, and our precedents. *It is so ordered.*

VACATED AND REMANDED.

Judges STROUD and HAMPSON concur.

IN RE D.C.

[275 N.C. App. 26 (2020)]

IN THE MATTER OF D.C.

No. COA20-235

Filed 15 December 2020

Child Abuse, Dependency, and Neglect—permanency planning—cessation of reunification efforts—required statutory findings

In a juvenile proceeding, the trial court erred by ceasing reunification efforts and omitting reunification from the child's permanent plan without making the required statutory findings. The trial court failed to make sufficient findings, as required by N.C.G.S. § 7B-902.6(d), and failed to make the ultimate finding required by N.C.G.S. § 7B-902.6(b)—that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety.

Appeal by Respondent-Father from orders entered 12 December 2019 by Judge James Randolph in Rowan County District Court. Heard in the Court of Appeals 17 November 2020.

Jane R. Thompson for petitioner-appellee Rowan County Department of Social Services.

Rebecca J. Yoder for appellee Guardian ad Litem.

Peter Wood for respondent-appellant Father.

COLLINS, Judge.

Respondent-Father appeals from orders terminating jurisdiction in a juvenile proceeding and awarding custody of his minor child "Donna" to Mr. and Mrs. "Brown."[1] Respondent argues that the trial court erred by implicitly ceasing reunification efforts in its 24 October orders without making statutory findings under N.C. Gen. Stat. § 7B-906.2. We vacate the orders and remand for further proceedings consistent with this opinion.

I. Factual Background and Procedural History

Donna was born on 26 March 2018. The next day, Rowan County Department of Social Services ("RCDSS") received a report from the

1. We use pseudonyms for the juvenile and the persons awarded custody throughout to protect the juvenile's identity. *See* N.C. R. App. P. 42(b). The minor child's mother is not a party to this appeal.

hospital nursing staff concerning Donna's welfare. Over the following 11 months, RCDSS attempted to assist the family with nutritional, parenting education, and mental health resources. During that time, RCDSS received additional reports concerning the adequacy of Donna's care, Donna's wellbeing, and the safety and stability of Respondent's household.

On 5 February 2019, RCDSS filed a juvenile petition alleging that Donna was neglected. The trial court granted RCDSS nonsecure custody; RCDSS placed Donna with Mrs. Brown, with whom Donna had been living since 15 August 2018. On 11 April 2019, Respondent and Mother (together, "the Parents") admitted that Donna was neglected as alleged in the juvenile petition.[2] In a consent order, the parties agreed that RCDSS would have custody of Donna and be responsible for her placement and care. The Parents also agreed to participate in mental health and substance abuse assessments and treatment, undergo drug screenings, and remain engaged in Donna's care.

Following the consent order, the trial court entered an "Adjudication/Disposition Order." In that order, the trial court made findings of fact, adjudicated Donna neglected, and incorporated the terms of the consent order. The trial court continued custody of Donna with RCDSS, found that RCDSS had made reasonable efforts to achieve reunification, and directed that reunification efforts should continue. The trial court also noted that "[t]he initial permanent plan will be set at the first permanency planning review."

RCDSS subsequently moved for review of custody and permanency planning on 24 July 2019. After two continuances, the trial court held a hearing "to review [Donna's] custody, placement, and permanent plan" on 24 October 2019. At the hearing, RCDSS recommended that the Browns be granted custody of Donna.

Following the hearing, the trial court entered both a Juvenile Order and a Custody Order. The Juvenile Order, entered in the juvenile proceeding, terminated the trial court's jurisdiction in the matter. This order included the following pertinent findings of fact:

> 3. . . . [Donna] was placed with non-relative kinship providers, [the Browns]. [Donna] continues to thrive and flourish in the home of Mr. and Mrs. [Brown]. She is in a safe and appropriate home and is bonded with the

2. Respondent and Mother denied only the allegation that there was domestic violence between them.

> [Browns] and their family. Mr. and Mrs. [Brown] are committed to providing permanent care for [Donna].
>
> 4. [The Parents] have not made adequate progress within a reasonable period of time under the plan, have not adequately participated or cooperated with the plan, or have not acted in a manner consistent with the health and safety of the juvenile.
>
> 5. The RCDSS recommends that custody of [Donna] be awarded to [the Browns]. Mr. and Mrs. [Brown] are ready and willing to provide permanence for [Donna]. The [Browns] understand the legal significance of having custody of [Donna] and have adequate resources to care appropriately for [Donna].
>
> 6. There is not a need for continued State intervention on behalf of the juvenile through this juvenile proceeding.
>
> 7. On this date, the court has entered an order pursuant to N.C.G.S. § 50-13.1, 50-13.2, 50-13.5, and 50-13.7, as provided in N.C.G.S. § 7B-911, considering that [Donna] has been safe and appropriate in [the Browns'] home for at least one year. The undersigned, RCDSS, and GAL are in agreement with the entry of both the civil custody order and this order terminating jurisdiction in the juvenile case.

The trial court then made the following conclusions of law:

> 1. The court has exclusive, continuing jurisdiction under N.C.G.S. § 50A-202 and has jurisdiction over the parties. Juvenile court jurisdiction will terminate with the entry of this order.
>
> 2. It is in the best interests of the juvenile, [Donna], for custody to be awarded to [the Browns], in a separate custody order.
>
> 3. Continuation of the court's jurisdiction in this matter is not necessary in order to protect the juvenile.

The Custody Order was entered in a new civil custody action, pursuant to N.C. Gen. Stat. § 7B-911. This order contained more extensive findings of fact concerning the fitness of the Parents and the quality of Donna's care. Based on these findings, the order awarded legal custody to the Browns.

The trial court signed both orders on 12 December 2019. Respondent gave written notice of appeal on 19 December.

II. Discussion

On appeal, Respondent argues that the trial court erred by implicitly ceasing reunification efforts in its 24 October orders without making the required statutory findings under N.C. Gen. Stat. § 7B-906.2.[3]

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re M.T.-L.Y.*, 265 N.C. App. 454, 466, 829 S.E.2d 496, 505 (2019) (citation omitted). The failure to make statutorily-mandated findings constitutes reversible error. *In re J.L.H.*, 224 N.C. App. 52, 60, 741 S.E.2d 333, 338 (2012).

After an initial dispositional hearing in an abuse, neglect, or dependency proceeding, the trial court must conduct regular review hearings. *See* N.C. Gen. Stat. § 7B-906.1(a) (2019) (prescribing a review hearing within 90 days of the initial dispositional hearing and at least every six months thereafter). "Within 12 months of the date of the initial order removing custody, there shall be a review hearing designated as a permanency planning hearing." *Id.* "At the conclusion of each permanency planning hearing, the court shall make specific findings as to the best permanent plans to achieve a safe, permanent home for the juvenile within a reasonable period of time." *Id.* § 7B-906.1(g) (2019).

"At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan." N.C. Gen. Stat. § 7B-906.2(b) (2019). "Reunification shall be a primary or secondary plan" except in three circumstances: (1) the court makes findings under N.C. Gen. Stat. § 7B-901(c) or § 7B-906.1(d)(3), (2) "the permanent plan is or has been achieved in accordance with [§ 7B-906.2(a1)]," or (3) "the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b).

To cease reunification efforts under section 7B-906.2(b) on grounds that such efforts "clearly would be unsuccessful or would be inconsistent

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3. The parties consider the Juvenile Order and the Custody Order together to assess whether the trial court made the findings required by section 7B-906.2. We therefore do not address whether the Juvenile Order, standing alone, must include the findings required by section 7B-906.2.

with the juvenile's health or safety," the trial court must assess the considerations set forth in section 7B-906.2(d). *In re S.B.*, 268 N.C. App. 78, 85, 834 S.E.2d 683, 689 (2019); *In re D.A.*, 258 N.C. App. 247, 253, 811 S.E.2d 729, 734 (2018). That section requires the court to

> make written findings as to each of the following, which shall demonstrate the degree of success or failure toward reunification:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2019).

We first address, as a threshold matter, whether the trial court ceased reunification efforts and omitted reunification from Donna's permanent plan. Respondent argues that the trial court implicitly ceased reunification efforts "by granting custody of Donna to the [Browns], not adopting a concurrent plan of reunification, and waiving all further review hearings." The Juvenile Order did not provide that reunification remained in Donna's permanent plan. The decretal portion of the Juvenile Order directed that the "Attorneys . . . , the GAL, and the RCDSS are hereby relieved of responsibility in this matter." By relieving RCDSS of its responsibilities, the trial court ceased reunification efforts. *See In re T.W.*, 250 N.C. App. 68, 73, 796 S.E.2d 792, 795-96 (2016) ("Only when reunification is eliminated from the permanent plan is the department of social services relieved from undertaking reasonable efforts to reunify the parent and child.").

Because the trial court ceased reunification efforts and omitted reunification from the permanent plan, it was required to satisfy section 7B-906.2(b). In this case, the parties do not argue that the trial court made findings under N.C. Gen. Stat. § 7B-901(c) or § 7B-906.1(d)(3) such that reunification need not have been a primary or secondary plan.

RCDSS and the GAL argue that reunification need not have been a primary or secondary plan because the permanent plan had been

achieved. RCDSS and the GAL contend that at the time the trial court entered the Juvenile Order, "RCDSS had been working with the parents on their reunification case plan for 19 months." In its own 11 April 2019 report to the trial court, however, RCDSS acknowledged that the permanent plan had not yet been established and recommended that the "initial" permanent plan be set at the first permanency planning hearing. The trial court's Adjudication/Disposition Order likewise found that "[t]he initial permanent plan will be set at the first permanency planning review." The first and only permanency planning hearing was not held until 24 October 2019.[4] While the Custody Order found that "the permanent plan for the juvenile was reunification with a parent" as of 10 April 2019, this finding was not supported by credible evidence, as no previous orders of the trial court had adopted a permanent plan. As such, RCDSS's contention that the permanent plan had been achieved at the time the trial court entered the Juvenile Order is without merit.

The trial court was thus required to find "that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety," N.C. Gen. Stat. § 7B-906.2(b), prior to ceasing reunification efforts and omitting reunification from the permanent plan. In its Juvenile Order, the trial court made the following pertinent findings of fact:

> [The Parents] have not made adequate progress within a reasonable period of time under the plan, have not adequately participated in or cooperated with the plan, or have not acted in a manner consistent with the health and safety of the juvenile.

These findings of fact are insufficient, in part because the trial court failed to address all of the considerations under section 7B-906.2(d). Specifically, the trial court made no findings concerning "[w]hether the parent[s] remain[ed] available to the court, the department, and the guardian ad litem for the juvenile." N.C. Gen. Stat. § 7B-906.2(d)(3). While the trial court found that the Parents "have not adequately participated in or cooperated with the plan," it did not address whether the Parents had cooperated with either RCDSS or the Guardian ad Litem as required by section 7B-906.2(d)(2). More fundamentally, the trial court omitted the crucial ultimate finding under section 7B-906.2(b) that "reunification

4. The trial court's Juvenile Order described the 24 October hearing as one "to review and implement the permanent plan for the minor child," its Custody Order described the hearing as one "to review the custody, placement, and permanent plan of the minor child."

efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety."

A trial court's findings pursuant to section 7B-906.2(b) "need not recite the statutory language verbatim," and an order will be sufficient so long as it "make[s] clear that the trial court considered the evidence in light of" the relevant standard. *In re L.M.T.*, 367 N.C. 165, 166, 167-68, 752 S.E.2d 453, 454-55 (2013) (examining the required statutory findings under the statutory provision antecedent to section 7B-906.2(b)). But here, the Juvenile Order does not address the ultimate question of whether reunification would be unsuccessful or inconsistent with Donna's safety. Nor does it contain any more detailed findings of fact pertinent to that question beyond the few listed above.

Like the Juvenile Order, the Custody Order contains the following findings of fact:

> Neither parent has made adequate progress within a reasonable period of time, has adequately participated in or cooperated with the plan, or has acted in a manner consistent with the health and safety of the juvenile.

Again, these findings of fact do not fully address the required considerations under section 7B-906.2(d).

The Custody Order does contain additional findings regarding domestic violence between the Parents, Respondent's completion of parenting and anger management programs, Respondent's failure to complete a Batterer's Intervention program, Mother's participation in counseling, and the Parents' inconsistent visitation with Donna. But even if construed liberally, these additional findings do not "make clear that the trial court considered the evidence in light of" the relevant standard. *In re L.M.T.*, 367 N.C. at 167-68, 752 S.E.2d at 454. Specifically, it is unclear that the trial court considered the degree to which the Parents "remain[ed] available to the court, the department, and the guardian ad litem for the juvenile." N.C. Gen. Stat. § 7B-906.2(d)(3).

Moreover, the Custody Order suffers the same defect as the Juvenile Order—it fails to address the ultimate question of whether reunification would be unsuccessful or inconsistent with Donna's safety. Even if we were to construe the Custody Order's findings as satisfying section 7B-906.2(d), and those findings "support[ed] an ultimate finding under N.C. Gen. Stat. § 7B-906.2(b), it is not the role of the reviewing court to draw inferences or make ultimate findings on the trial court's behalf." *In re T.W.*, 250 N.C. App. at 76, 796 S.E.2d at 797; *see also In re D.A.*, 258

N.C. App. at 254, 811 S.E.2d at 734 (holding a trial court's order ceasing reunification efforts was insufficient where it "contain[ed] no findings that embrace the requisite ultimate finding that 'reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety").

Because the trial court ceased reunification efforts without making sufficient findings pertinent to section 7B-906.2(d) and the ultimate finding required by section 7B-906.2(b), we vacate the trial court's orders and remand for further proceedings. *See Sherrick v. Sherrick*, 209 N.C. App. 166, 169-70, 704 S.E.2d 314, 317 (2011) (stating that an order properly entered under section 7B-911 is a jurisdictional prerequisite to transferring the proceeding to a Chapter 50 custody action).

III. Conclusion

Because the trial court ceased reunification efforts and omitted reunification from Donna's permanent plan without making the requisite statutory findings, we vacate the Juvenile Order and Custody Order and remand for further proceedings consistent with this opinion. The trial court is to make the necessary statutory findings–supported by clear, cogent and convincing evidence–and conclusions to determine whether to cease reunification efforts.

VACATED AND REMANDED.

Judges DIETZ and ZACHARY concur.

IN RE Q.M.

[275 N.C. App. 34 (2020)]

IN THE MATTER OF Q.M., JR.

No. COA19-1133

Filed 15 December 2020

1. Appeal and Error—untimely appeal—petition for writ of certiorari—adjudication of dependency

The Court of Appeals dismissed respondent-mother's appeal from the trial court's orders adjudicating her infant son as dependent and maintaining his custody with the county department of social services where her amended notice of appeal (filed to correct the first notice of appeal's lack of proper signature) was untimely filed. But her petition for writ of certiorari requesting review of the merits was allowed in the court's discretion.

2. Child Abuse, Dependency, and Neglect—dependency—availability of alternative arrangements—failure to make adequate findings—father's paternity established

The trial court erred by adjudicating respondent-mother's infant son as dependent where a number of the trial court's findings were unsupported by the evidence and the findings failed to adequately address the availability of alternative arrangements for the child. Importantly, the father established paternity after the juvenile petition was filed and expressed interest in having the child placed with him.

Appeal by Respondent-Mother from Orders entered 24 June 2019, by Judge Leonard W. Thagard and 19 September 2019, by Judge Timothy Smith in Sampson County District Court. Heard in the Court of Appeals 3 November 2020.

Elizabeth Myrick Boone and Warrick, Bradshaw & Lockamy, PA, by Frank L. Bradshaw, for petitioner-appellee Sampson County Department of Social Services.

Surratt Thompson & Ceberio PLLC, by Christopher M. Watford, for respondent-appellant mother.

Matthew D. Wunsche for guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Mother appeals from Orders adjudicating her son Q.M., Jr. (Quan)[1] a dependent juvenile under N.C. Gen. Stat. §7B-101 (Adjudication Order) and maintaining the child in the custody of Sampson County Department of Social Services (DSS) (Disposition Order). The Record reflects the following:

On 25 October 2018, Respondent-Mother gave birth to Quan. At the time of Quan's birth, Respondent-Mother was a ward of the Cumberland County Department of Social Services. Respondent-Mother had a history of mental health issues and had been appointed a Guardian ad litem pursuant to Rule 17 of the North Carolina Rules of Civil Procedure.

Four days after Quan's birth, on 29 October 2018, DSS filed a petition alleging Quan was a dependent juvenile. The Petition identified Quan's putative father (Respondent-Father),[2] who had informed DSS he was Quan's father and was willing to take a paternity test. The same day, DSS obtained an Order for Nonsecure Custody and placed Quan into foster care. On or about 9 November 2018, the trial court ordered Respondent-Father to submit to paternity testing, which he completed on 17 January 2019, and which was transmitted to the trial court on 28 January 2019. On 14 February 2019, the trial court held a hearing to establish paternity; however, the trial court did not enter a formal written Judgment of Paternity adjudicating Respondent-Father as Quan's father until 3 June 2019.

In the meantime, DSS maintained nonsecure custody of Quan and he remained with his foster family. The trial court held Quan's adjudication hearing on 23 May 2019. Respondent-Mother was not present at the hearing but was represented by counsel and her Guardian ad litem. On 24 June 2019, the trial court entered its written Adjudication Order. In the Adjudication Order, the trial court found:

> 1. That pursuant to N.C. Gen. Stat. § 7B-801, this matter came on for adjudication upon a Petition filed by [DSS] on February 14, 2019.
>
> . . . .

1. Quan is the stipulated pseudonym used to protect the identity of the juvenile under Rule 42. N.C.R. App. P. 42 (2020).

2. The Record reflects Respondent-Father was present and represented by counsel at the adjudication hearing; however, Respondent-Father does not appeal the trial court's Adjudication Order or subsequent Disposition Order.

3. That the Respondent Mother was previously appointed [a] Rule 17 Guardia[n] ad Litem.

4. That the father of the Juvenile, [Respondent-Father], was personally served with the Petition and Summons on February 14, 2019.

. . . .

6. That [DSS] received a report of potential abuse, neglect, and/or dependency on October 25, 2018.

7. That the Respondent Mother was previously adjudicated to be incompetent and is currently a ward of the Cumberland County Department of Social Services.

. . . .

10. That the Respondent Mother refused to work a service agreement with [DSS] with respect to the other juvenile.

11. That due to her behaviors and the safety of the other Juvenile, the mother's visitations with respect to the other child were terminated.

12. That there were no additional family members that were available for placement of the juvenile at the time of the filing of the petition and the Respondent Father was merely a putative father at the time.

13. That the Juvenile is a dependent juvenile pursuant to N.C. Gen. Stat. §7B-101(9) in that: (i) the Juvenile needs assistance or placement because the Juvenile has no parent, guardian, or custodian responsible for the Juvenile's care or supervision; and (ii) the Juvenile's parent, guardian or custodian is unable to provide for the Juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

The trial court ultimately adjudicated Quan as a dependent juvenile under N.C. Gen. Stat. § 7B-101(9).

On 1 August 2019, the trial court held its dispositional hearing and on 19 September 2019, entered its written Disposition Order. The Disposition Order set a primary plan of reunification and a concurrent, secondary plan of guardianship. The Disposition Order ordered Quan's legal custody remain with DSS; however, it set Quan's physical placement

with Respondent-Father. The Disposition Order provided, "there shall be no visitation between the Juvenile and Respondent Mother unless otherwise ordered by this Court."

On 17 October 2019, Respondent-Mother filed written Notice of Appeal from the Adjudication and Disposition Orders. The 17 October Notice of Appeal was signed by Respondent-Mother's trial counsel but was not signed by Respondent-Mother or her Guardian ad litem. On 23 October 2019, the trial court noted the appeal, and on 7 November 2019, the Office of the Parent Defender was appointed to represent Respondent-Mother on appeal. On 4 December 2019, DSS filed a Motion to Dismiss the appeal for violations of N.C. Gen. Stat. §§ 7B-1001(a)(3), (b), and (c), in that the 17 October Notice of Appeal was not signed by Respondent-Mother or her Guardian ad litem. Then, on 10 December 2019 Respondent-Mother filed an Amended Notice of Appeal, this time bearing her counsel's signature as well as the signature of Respondent-Mother's Guardian ad litem.

Contemporaneous with her brief, Respondent-Mother filed a Petition for Writ of Certiorari to this Court seeking our review of the Adjudication and Disposition Orders despite the untimely Amended Notice of Appeal on 27 January 2020. On 31 January 2020, DSS again filed a Motion to Dismiss Respondent-Mother's appeal.

Appellate Jurisdiction

[1] As an initial matter, Respondent-Mother's Notice of Appeal and Amended Notice of Appeal are procedurally defective. Under N.C. Gen. Stat. § 7B-1001, "[a]ny initial order of disposition and the adjudication order upon which it is based" is appealable to this Court provided: (1) the notice of appeal is given in writing by a proper party *and* made within 30 days after entry and service, and (2) the notice of appeal is signed by both the appealing party and counsel for the appealing party. N.C. Gen. Stat. § 7B-1001(a)-(c) (2019). The first Notice of Appeal was not signed by Respondent-Mother, a violation of N.C. Gen. Stat. § 7B-1001(c), nor was it signed by Respondent-Mother's Guardian ad litem. This defect was subsequently corrected in the Amended Notice of Appeal, which was signed by Respondent-Mother's Guardian ad litem. N.C. Gen. Stat. § 7B-1001(c) (2019); *see* N.C. Gen. Stat. § 1A-1, Rule 17(e) (2019) ("Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules[.]"). However, the Amended Notice of Appeal was filed on 10 December 2019, making it untimely. N.C. Gen. Stat. § 7B-1001(b). Therefore, because

Respondent-Mother's Amended Notice of Appeal is untimely in violation of Section 7B-1001(b), we allow DSS's Motion to Dismiss.

However, Respondent-Mother also filed a Petition for Writ of Certiorari requesting this Court grant her appeal on the merits despite the defects in her Amended Notice of Appeal. N.C. Gen. Stat. § 7A-32(c), as implemented through Rule 21 of our Rules of Appellate Procedure, provides this Court the authority to issue a writ of certiorari "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1) (2020); N.C. Gen. Stat. § 7A-32(c) (2019). Moreover, this Court has granted certiorari in cases akin to the present. *See In re A.S.*, 190 N.C. App. 679, 683, 661 S.E.2d 313, 316 (2008) ("Although the order at issue involves only an initial adjudication of neglect, the disposition could be read as ordering DSS to cease reunification efforts with respondent . . . . Given the serious consequences of the adjudication order, . . . we believe that review pursuant to a writ of certiorari is appropriate."). In our discretion, we grant Respondent-Mother's petition in order to review the merits of Respondent-Mother's case.

Issue

[2] The dispositive issue on appeal is whether the trial court erred in adjudicating Quan as a dependent juvenile.

Standard of Review

This Court reviews a trial court's adjudication of dependency "to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact[.]" *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citations and quotation marks omitted). Unchallenged findings of fact are binding on appeal. *In re V.B.*, 239 N.C. App. 340, 341, 768 S.E.2d 867, 868 (2015) (citation omitted). "The conclusion that a juvenile is abused, neglected, or dependent is reviewed *de novo*." *Id.* (citations omitted).

Analysis

I. Adjudication of Dependency

A dependent juvenile is a juvenile "in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2019). "In determining whether a juvenile is dependent, the trial court must address *both* (1) the parent's

ability to provide care or supervision, and (2) the availability to the parent of alternative childcare arrangements." *In re T.B.*, *C.P.*, *& I.P.*, 203 N.C. App. 497, 500, 692 S.E.2d 182, 184 (2010) (emphasis added) (citation and quotation marks omitted). "Adjudicatory hearings for dependency are limited to determining only 'the existence or nonexistence of any of the conditions alleged in [the] petition.' " *In re V.B.*, 239 N.C. App. at 341, 768 S.E.2d at 868 (citing N.C. Gen. Stat. § 7B-802 (2013)).

Respondent-Mother challenges several of the trial court's findings of fact, asserting they are not supported by clear and convincing evidence, and further, that the findings do not support the trial court's ultimate conclusion Quan is a dependent juvenile under N.C. Gen. Stat. § 7B-101(9).

First, Respondent-Mother challenges Finding 1, which purports to find DSS filed the underlying Petition in this case on 14 February 2019. Our review of the Record reflects DSS filed a petition alleging Quan was dependent on 29 October 2018. Indeed, DSS concedes this Finding is erroneous and contends it is a typographical error. Finding of Fact 1, although not of significant consequence to the outcome of this case, is therefore not supported by clear and convincing evidence.

In Finding 6, the trial court found "[DSS] received a report of potential abuse, neglect, and/or dependency on October 25, 2018." Respondent-Mother contends this Finding is not supported by the evidence as "the trial court received no live testimony or took notice of any written document that established the existence of a report and the basis for that report being alleged 'abuse, neglect, and/or dependency on October 25, 2018.' " DSS contends this Finding is supported by clear and convincing evidence because "this finding was in the verified Petition in the Record." The Petition incorporates by reference "Exhibit A." Exhibit A states, "on October 25, 2018, [DSS] received a report of neglect dependency and injurious environment regarding the Juvenile [Quan]." Thus, Finding 6 is supported.

Respondent-Mother next challenges Finding 10—that she "refused to work a service agreement with [DSS] with respect to the other juvenile"—as unsupported by the evidence. At the dependency hearing, Social Worker LeTyssa Stokes (Stokes) testified as the foster care worker for both Quan and Respondent-Mother's older child. Counsel for DSS inquired: "And was [Respondent-Mother] able to complete a service agreement with the Department in the other case?" To which Stokes responded, "Yes, she was." Stokes stated problems arose with Respondent-Mother during that case and testified during visitations

Respondent-Mother "had tried to take [the other juvenile] with her" and then that "[Respondent-Mother] tried to hit me at one point when I had [the other juvenile] in my possession." Despite Stokes' testimony that there were problems with Respondent-Mother's other case, the Record and testimony elicited at the hearing does not support the trial court's finding Respondent-Mother "refused to work a service agreement with DSS . . . ." To the contrary, Stokes' testimony established Respondent-Mother did in fact complete a service agreement with respect to her other child. Therefore, Finding 10 is not supported by clear and convincing evidence.

In Finding 11, the trial court found Respondent-Mother's visitations with her other child were terminated due to her behaviors and the safety of the other juvenile. Again, this Finding is not supported by clear and convincing evidence. Stokes briefly testified that during visitations Respondent-Mother "had tried to take [the other juvenile] with her" and then "[Respondent-Mother] tried to hit me at one point when I had [the other juvenile] in my possession." However, Stokes did not offer any testimony to support a finding Respondent-Mother's visitation was terminated. The Record is similarly devoid of evidence Respondent-Mother's visitation was *terminated*. DSS contends that a GAL report contained in the Record and admitted at a hearing supports the Finding; however that report merely states "[the other juvenile] has no contact with the birth parents nor any siblings outside of the home or paternal or maternal grandparents' aunts or uncles." Although there is evidence and testimony describing behavioral issues during Respondent-Mother's visitation, we cannot infer from that testimony Respondent-Mother's visitation was, in fact, terminated. Accordingly, Finding 11 is not supported by clear and convincing evidence.

Finding 12 found "there were no additional family members that were available for placement of [Quan] at the time of the filing of the petition and the Respondent-Father was merely a putative father at the time." DSS contends this Finding is supported because the Father was listed only as "putative" on the Petition and because he was not listed on the birth certificate. However, despite Respondent-Father's label as putative, which is not disputed, Exhibit A as incorporated into the Petition states Respondent-Father "claim[ed] to be Respondent Father." At the dependency hearing DSS social worker Megan Snell acknowledged Respondent-Father was Quan's father and testified she spoke with Respondent-Father on 29 October 2018, at which time he stated "if he were to be the father of [Quan] and he were to get custody of him, he would not leave [Quan] unsupervised with [Respondent-Mother]."

Similarly, there is no evidence of additional family members that were available for placement; however, there is also no evidence of any efforts on behalf of DSS to locate any additional family members.

"[P]ost-petition evidence generally is not admissible during an adjudicatory hearing . . . . However, this rule is not absolute." *Id.* at 344, 768 S.E.2d at 869-70. This is particularly so in the context of post-petition evidence regarding paternity because "paternity is not a discrete event or one-time occurrence. It is a fixed and ongoing circumstance[.]" *Id.*, 239 N.C. App. at 344, 768 S.E.2d at 870.

We find this Court's reasoning in *In re V.B.* persuasive. It is worth noting the Petition in the present case was filed merely four days after Quan's birth. Based on the timeline in which DSS filed the Petition alone, under DSS's position, Respondent-Father had only a four-day window from the time Quan was born to conclusively establish paternity that would then not be excluded as post-petition evidence. At the adjudication hearing, Quan's social worker testified regarding her conversation with Respondent-Father where he indicated he suspected he was the father *and* described measures he would take regarding Quan's supervision and care were he to have custody. Indeed, Respondent-Father's counsel questioned Stokes: "Had he been the father at [the] time [the Petition was filed], the Department would have taken proactive measures to see if he would potentially be a placement for that child before filing a petition?" To which Stokes responded, "Yes." Thus, despite the fact Respondent-Father was only identified as the "putative" father at the time of the filing of the Petition, in light of this Court's holding in *In re V.B.* and the undisputed evidence Respondent-Father established paternity, we conclude there is not clear and convincing evidence to support Finding 12.

Respondent-Mother challenges Finding 13 and contends it operates more as a conclusion of law concluding Quan is a dependent juvenile. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) ("As a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." (citations omitted)). We agree, and accordingly, we review the conclusion de novo and discern whether the trial court's remaining findings of fact support the conclusion.

Finding 13 provides:

> [T]he Juvenile is a dependent juvenile pursuant to N.C. Gen. Stat. §7B-101(9) in that: (i) the Juvenile needs assistance or placement because the Juvenile has no parent, guardian,

> or custodian responsible for the Juvenile's care or supervision; and (ii) the Juvenile's parent, guardian or custodian is unable to provide for the Juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

"In determining whether a juvenile is dependent, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re T.B.*, 203 N.C. App. at 500, 692 S.E.2d at 184 (citation and quotation marks omitted). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *In re V.B.*, 239 N.C. App. at 342, 768 S.E.2d at 868 (citations and quotation marks omitted). "Moreover, although N.C.G.S. § 7B-101(9) uses the singular word 'the [] parent' when defining whether 'the [] parent' can provide or arrange for adequate care and supervision of a child, our caselaw has held that a child cannot be adjudicated dependent where she has at least 'a parent' capable of doing so." *Id.* (citation omitted).

Accordingly, in light of the trial court's unsupported findings, we vacate the trial court's Adjudication Order. The crux of the trial court's conclusion rests upon the fact Respondent-Mother was a ward of Cumberland County DSS and had been diagnosed with multiple mental health issues, rendering her unable to be responsible for or provide for Quan's care. Although such findings are unchallenged on appeal, Respondent-Mother's inability to care for Quan on her own does not create a sufficient basis to adjudicate Quan dependent where Respondent-Father was known to DSS and, in fact, spoke with Quan's social worker in direct contemplation of caring for Quan. *See id.* The trial court must address "*both* (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re T.B.*, 203 N.C. App. at 500, 692 S.E.2d at 184 (emphasis added) (citation omitted). The trial court's findings do not adequately address the availability of alternative arrangements for Quan. Thus, the trial court erred in concluding Quan was dependent without making findings supported by the evidence to then support its Conclusions of Law. Therefore, we remand this matter to the trial court to make proper findings supported by the clear and convincing evidence in the Record and to re-evaluate whether Quan is a dependent juvenile as defined by N.C. Gen. Stat. § 7B-101(9).

II. Disposition

Respondent-Mother also challenges the trial court's Disposition Order. Because we vacate the Adjudication Order, we also vacate the

trial court's Disposition Order. *See In re S.C.R.*, 217 N.C. App. 166, 170, 718 S.E.2d 709, 713 (2016).

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's Adjudication Order and Disposition Order and remand this matter to the trial court for further findings of fact supported by the evidence and a new determination as to whether Quan is a dependent juvenile.

VACATED AND REMANDED.

Judges TYSON and MURPHY concur.

THOMAS KEITH AND TERESA KEITH, PLAINTIFFS-APPELLEES/CROSS-APPELLANTS
v.
HEALTH-PRO HOME CARE SERVICES, INC., DEFENDANT-APPELLANT/CROSS-APPELLEE

No. COA19-118

Filed 15 December 2020

1. Negligence—robbery by home health aide—claim brought against employer—ordinary negligence versus negligent hiring, retention, and supervision

The trial court erred in allowing plaintiffs' action against a home health agency to proceed on a theory of ordinary negligence where plaintiffs' allegations and the evidence at trial only supported a claim of negligent hiring, retention, and supervision (based on the actions of a home health aide employed by the agency who committed an off-duty break-in and robbery of plaintiffs' home after working there). Defendants' request for the jury to be instructed on negligent hiring should have been allowed and the denial of that request was clearly prejudicial. The matter was reversed and remanded for entry of an order granting defendants' motion for judgment notwithstanding the verdict on the ordinary negligence claim.

2. Negligence—robbery by home health aide—claim against employer—negligent hiring, retention, and supervision

In an action alleging that a home health agency was negligent for providing a home health aide who committed an off-duty break-in and robbery of plaintiffs' home after working there, plaintiffs were required to prove elements from *Little v. Omega Meats I., Inc.*,

171 N.C. App. 583 (2005), establishing that defendants owed a duty of care to protect plaintiffs from their employee's actions and that a reasonable person would have foreseen the employee's actions. The evidence presented, however, was insufficient to prove those elements or to demonstrate proximate cause, and the trial court should have granted defendants' motion for judgment notwithstanding the verdict on negligent hiring, retention, and supervision.

Judge DILLON dissenting.

Appeal by Defendant from order entered 26 March 2018 by Judge Marvin K. Blount in Superior Court, Pitt County. Heard in the Court of Appeals 4 June 2019.

Ward and Smith, P.A., by Jeremy M. Wilson, Alexander C. Dale, and Christopher S. Edwards, for Plaintiffs-Appellees and Plaintiffs-Cross-Appellants.

Hedrick Gardner Kincheloe & Garafalo LLP, by M. Duane Jones, Michael S. Rothrock, and Linda Stephens, for Defendant-Appellant and Defendant-Cross-Appellee.

McGEE, Chief Judge.

Defendant-Employer Health-Pro Home Care Services, Inc. ("Defendant" or "Health-Pro") appeals from the denial of its motions for directed verdict and its motion for a judgment notwithstanding the verdict ("JNOV") on the negligence claim of Plaintiffs Thomas Keith ("Mr. Keith") and Teresa Keith ("Mrs. Keith," together with Mr. Keith, "Plaintiffs"). Because this Court holds that Plaintiffs' claim was one pursuant to the doctrine of negligent hiring, retention, or supervision, not, as argued by Plaintiffs, one in ordinary negligence, we agree with Defendant, reverse, and remand for entry of a JNOV in Defendant's favor. We further dismiss Plaintiffs' conditional cross-appeal as moot.

I. Facts

In relevant part, the substantial evidence introduced at trial supporting Plaintiffs' negligence complaint included the following facts: Defendant "provides in-home health care for disabled and elderly individuals." Plaintiffs "are an elderly couple who live alone at their home in Pitt County[.]" Plaintiffs "hired [Defendant] approximately three years [prior to filing this action] to provide in-home care." "Originally,

Health-Pro aides were scheduled to come to [Plaintiffs'] home from 8:00 a.m. to 2:00 p.m. and then again from 6:00 p.m. to 11:00 p.m." However, Plaintiffs "eventually" requested that "Health-Pro aides" provide services "for the entire day." "Health-Pro aides" such as Deitra Clark ("Ms. Clark") would "provide the following services to [Plaintiffs], among others: laundry; retrieving the mail and newspaper; preparing meals; washing, bathing, and dressing Mrs. Keith; cleaning the house; and running various errands for [Plaintiffs], including driving Mrs. Keith to the store and to doctor appointments." Aides such as Ms. Clark were employees of Defendant. Naturally, due to the nature of the job, "[Ms.] Clark was able to gain extensive information about [Plaintiffs] and their home including, but not limited to, how to enter and exit the home, details of [Plaintiffs'] personal property and other assets, and the location of valuables within the home."

"In the fall of 2015, [Plaintiffs] discovered that approximately $90.00 in rolled coins had been stolen from a box inside their home." "In July or August 2016, approximately . . . $1,200.00 was stolen from [Mrs. Keith's] dresser drawer, and $90.00 was stolen from Mr. Keith's wallet." At the time Plaintiffs noticed the missing money in August, they informed "Sylvester Bailey [("Mr. Bailey")], one of the officers and owners of Health-Pro, of the" money missing from Mr. Keith's wallet, the money missing from Mrs. Keith's dresser drawer, as well as the "missing rolled coins" allegedly stolen in "the fall of 2015." In response, "[Mr.] Bailey stated that he would take appropriate action, including determining which employee might be responsible and responding accordingly." "[Mr.] Bailey identified two employees who may have been working for Plaintiffs "in the fall of 2015" as well as "[i]n July or August 2016," one of whom was Ms. Clark, the other Clementine Little ("Ms. Little") and "assured [Plaintiffs] that neither [employee would] again [ ] be assigned to [Plaintiffs'] home. [Plaintiffs and their son, Frederick Keith ("Frederick"),] specifically told [Mr.] Bailey that they did not want [Ms.] Clark assigned as an aide [ ] in their home." However, two or three weeks later, Defendant "again assigned [Ms.] Clark to [work as an aide in Plaintiffs'] home." Plaintiffs allege that because they "relied on Health-Pro aides to take care of them, including to assist with various activities of daily living and to transport Mrs. Keith to the medical appointments," Plaintiffs "essentially were forced to accept aide assignments made by [Defendant]."

Sometime "between 12:00 midnight and 1:00 a.m. on September 29, 2016," Plaintiffs were the victims of "a home invasion [ ] robbery" perpetrated by Ms. Clark and two male accomplices. "[Ms.] Clark [knew the location of] a key to [Plaintiffs'] home which, upon information and

belief, was used to enter the home[.]" "The male accomplices forced their way inside [Plaintiffs'] home[and one of the men] held a gun to Mr. Keith's head. One male accomplice then forced Mr. Keith at gunpoint to drive him to an ATM, where he forced Mr. Keith to withdraw $1,000.00 in cash." "The other male accomplice held Mrs. Keith at the home as a hostage during the time." "In addition to the $1,000.00 in cash, [Ms.] Clark and the two male accomplices stole over $500.00 in coins as well as a gun from [Plaintiffs'] home." Ms. Clark did not enter Plaintiffs' home and, at the time of the robbery and kidnapping, Plaintiffs did not know Ms. Clark was involved.

"Following the robbery, [Ms.] Clark and one of her accomplices went to Wal-Mart, spent some of the money they had stolen from [Plaintiffs], and then tried to 'cash in' the rolled coins. [Ms.] Clark and her two male accomplices were all subsequently arrested." Mr. Bailey's wife Doris Bailey ("Ms. Bailey"), "the director of Health-Pro, came to [Plaintiffs'] home the morning following the robbery. [Ms.] Bailey admitted that [Ms.] Clark was involved in the robbery and as a result was being terminated by [Defendant]. [Ms.] Bailey also revealed that [Defendant] had some prior knowledge of a criminal record concerning [Ms.] Clark."

Plaintiffs included two claims in their complaint—a claim of "negligence," and a claim for "punitive damages." Defendant moved for summary judgment on 7 September 2017, which motion was denied on 12 December 2017. Defendant stipulated before trial that Ms. Clark "was an employee of Defendant . . . on September 29, 2016"—the date of the criminal acts perpetrated against Plaintiffs—and that Ms. Clark "was involved with, and had responsibility for, the . . home invasion and robbery of Plaintiffs[.]" "Plaintiffs' contested issue[ ] to be tried by the jury" was set forth by Plaintiffs as: "Were [ ] Plaintiffs . . . injured by the negligence of Defendant[.]" This matter went to trial on 19 March 2018.

At trial, Defendant objected to the introduction of certain screenshots from Ms. Clark's Facebook page, stating that it was Defendant's "understanding Plaintiffs intend to introduce [the] screenshots . . . [and] argue that [Ms. Clark's Facebook account] was one of the things [ ] *Defendant should have checked when hiring her and also having her as an employee*." (Emphasis added). Defendant's attorney argued that Ms. Clark posted the contested Facebook posts *while* she was employed by Defendant, *not before*, and that "there is no legal authority which I am aware of that requires perspective employers to utilize social media as a screening tool for job applicants and there's no legal authority which I am aware of that requires a current employer to continually screen an employee's social media account." Plaintiffs argued the Facebook posts were relevant because "Defendants themselves *create a duty two*

separate ways. One, they had a *background check policy* that said if there were any sort of charges or even misdemeanors but before someone is hired there needed to be an investigation of exactly what happened" and, two, "these *posts are the one threat* . . . during the time [Ms. Clark] was in [Plaintiffs'] home when money started going missing[.]" (Emphasis added).

After the close of Plaintiffs' evidence, Defendant moved for a directed verdict, arguing that Plaintiffs had failed to introduce sufficient evidence to support a claim for negligent hiring, supervision, or retention,[1] or for punitive damages. Plaintiffs countered that their claim was one based upon "ordinary" negligence, not negligent hiring. The trial court denied Defendant's motion. At the close of all the evidence, Defendant renewed its motion which was again denied. However, the trial court granted Defendant's motion for a directed verdict on Plaintiff's claim for punitive damages.

The trial court instructed the jury, in relevant part, as follows: "W[ere] [ ] Plaintiff[s] . . . injured by the negligence of [ ] Defendant[.]" "This means that [ ] Plaintiff[s'] must prove by the greater weight of the evidence that [ ] Defendant was negligent and that such negligence was a proximate cause of [ ] Plaintiff[s'] injury." "[N]egligence refers to a person's or company's failure to follow a duty of conduct imposed by law. Every person or company is under a duty to use ordinary care to protect himself and others from injury." The trial court instructed that "ordinary care" meant "that degree of care which a reasonable and prudent person would use under the same or similar circumstances[.]" The trial court defined proximate cause as "a cause which in natural and continuous sequence produces a person's injury and is a cause which a reasonable and prudent person could have foreseen would probably produce such injury or some similar injurious result." The jury found in favor of Plaintiffs, awarded Mr. Keith $500,000.00 in damages, and Mrs. Keith $250,000.00. Defendant moved for a JNOV, which the trial court denied. Defendant appeals, and Plaintiffs include a conditional cross-appeal from the trial court's grant of a directed verdict in favor of Defendant on Plaintiffs' claim for punitive damages.

II. Analysis

Defendant argues on appeal that the trial court erred in allowing Plaintiffs' action to go to the jury as one in "ordinary" negligence, and

1. For the sake of simplicity, we will sometimes use "negligent hiring" as shorthand for the legal doctrine that includes negligent hiring as well as negligent supervision and negligent retention.

in instructing the jury accordingly. Defendant contends Plaintiffs' action should have been submitted to the jury as one based on the doctrine of negligent hiring, supervision, or retention. Defendant further argues that "the trial court erred in denying Defendant's motions for directed verdict" and Defendant's motion for a JNOV, because the evidence was insufficient to support a verdict against Defendant for either ordinary negligence or negligent hiring.

A. *Standard of Review*

It is well established:

> A motion for directed verdict . . . tests the legal sufficiency of the evidence to take the case to the jury. In ruling on a defendant's motion for directed verdict, the trial court must take plaintiff's evidence as true, considering plaintiff's evidence in the light most favorable to him and giving him the benefit of every reasonable inference. Defendant's motion for a directed verdict should be denied "unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." Given these principles it is clear that a defendant in a negligence action is not entitled to a directed verdict unless the plaintiff has failed, as a matter of law, to establish the elements of actionable negligence.

Little v. Omega Meats I, Inc., 171 N.C. App. 583, 586, 615 S.E.2d 45, 47-48, *aff'd per curiam*, 360 N.C. 164, 622 S.E.2d 494 (2005).

> A JNOV motion seeks entry of judgment in accordance with the movant's earlier motion for directed verdict, notwithstanding the contrary verdict returned by the jury. *See* G.S. § 1A–1, Rule 50(b). A ruling on such motion is a question of law, and presents for appellate review the identical issue raised by a directed verdict motion, *i.e.*, whether the evidence considered in the light most favorable to the non-movant was sufficient to take the case to the jury and to support a verdict for the non-movant.

Bahl v. Talford, 138 N.C. App. 119, 122, 530 S.E.2d 347, 350 (2000) (citations omitted). Therefore, our decision on the trial court's denial of Defendant's motion for a JNOV will also decide Defendant's motions for a directed verdict. However, in order to decide whether the trial court properly denied Defendant's motion for a JNOV, we must first decide

whether Plaintiffs' case was appropriately presented to the jury as an "ordinary" negligence claim instead of an action for negligent hiring. We therefore review the law of this state, and consider the law from other jurisdictions, regarding an employer's liability for torts committed by one of its employees.

B. *Law of Employer Liability for Tortious Acts of Employees*

As noted, Defendant argues in part: "Plaintiffs contend their claims against [Defendant] arise in *[ordinary] common law negligence*, yet their arguments and the evidence they rely on demonstrate that Plaintiffs' claims are for the negligent hiring, supervision, and retention of an employee." (Emphasis added). We first want to clarify that an action for negligent hiring is a "common law" remedy based in negligence. Before the common law development of negligent hiring expanded employer liability for the injuries sustained by third parties due to the negligent acts of employees, the sole common law remedy was to bring an action based upon the well-established doctrine of *respondeat superior*. *Respondeat superior* is not a direct action against the employer based on the employer's negligence, instead, the employer's liability is predicated on establishing (1) agency—the tortfeasor was employed by the employer, and was acting in the course of that employment—and (2) negligence—*the employee's* negligent actions were the proximate cause of the third party's injury and damages.

North Carolina courts have been reticent to impose liability on employers for the acts of their employees. The early cases from our Supreme Court mainly concerned situations where one employee injured another employee, or where an employee injured a customer while acting as the employer's agent in the furtherance of the employer's business interests. The doctrine of negligent hiring was developed and became universally recognized in this country as a common law remedy, developed from common law negligence principles in order to provide relief where the relevant facts of a case precluded recovery pursuant to *respondeat superior*. The doctrine of negligent hiring is a proper cause of action in limited circumstances—when the *negligence of the employer* is the legal proximate cause of its employee's wrongful actions, and the employee's wrongful acts result in damages to a third party.

The common law development of a "new" cause of action for negligent hiring allowed plaintiffs, in certain circumstances, to hold an employer liable for the negligent or intentional acts of its employee, even when the employee was not acting within the scope of employment. Because both negligent hiring and *respondeat superior* are "common law" actions requiring the plaintiff to establish negligence,

they are actions in "common law" negligence.[2] Therefore, what is sometimes referred to as "common law" negligence we will refer to as "ordinary" negligence.

As noted by our Supreme Court: "To state a claim for [all theories of] common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Asheville City Bd. Of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006) (citations omitted.) Judge Cardozo stated in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (1928), the seminal opinion concerning an employer's liability for the acts of its employees: "Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. 'Proof of negligence in the air, so to speak, will not do.' 'Negligence is the absence of care, according to the circumstances.' " *Palsgraf*, 162 N.E. at 99 (citations omitted). In *Palsgraf*, the court recognized that *the existence of the legal duty itself* requires that a reasonable person in the defendant's position would reasonably *foresee* the likelihood that the defendant's act or omission would result in the kind of injury suffered by the plaintiff. " 'In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury.' " *Id.* at 99-100. Citing *Palsgraf*, our Supreme Court noted: "*[T]he threshold question is whether plaintiffs successfully allege [the employer] had a legal duty to avert the attack on [the injured plaintiff]. Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 342-44, 162 N.E. 99, 99-100 (1928)." *Stein*, 360 N.C. at 328, 626 S.E.2d at 267-68 (emphasis added).

Our Supreme Court has adopted the theory of duty as set forth in *Palsgraf* in *Stein*, 360 N.C. at 328, 626 S.E.2d at 267-68, and has recognized the requirement that the plaintiff prove the injury complained of was the foreseeable result of the employer's alleged acts or omissions in order to prove the employer owed the plaintiff a legal duty of care: "*No legal duty* exists unless *the injury* to the plaintiff *was foreseeable* and avoidable through due care." *Stein*, 360 N.C. at 328, 626 S.E.2d at 267 (emphasis added) (citations omitted). The Court also noted: "Whether a plaintiff's injuries were foreseeable depends on the facts of the particular case." *Id.* at 328, 626 S.E.2d at 267-68 (citation omitted).

Plaintiffs in this case contend that *respondeat superior* and negligent hiring are simply *alternative* theories, *in addition to* ordinary

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2. *Respondeat superior* is based upon both agency and the negligence of the employee, which is an element that must be proven by the plaintiff.

negligence, by which a plaintiff may sue an employer for the negligent or intentional acts of its employees. Defendant argues on appeal that Plaintiffs' action was in reality an action pursuant to the doctrine of negligent hiring, that the trial court erred in instructing the jury under ordinary negligence instead of negligent hiring, and that Plaintiffs' evidence was insufficient to survive Defendant's motions for directed verdicts and a JNOV under any theory of Defendant's alleged liability for the criminal acts of its employee, Ms. Clark. Plaintiffs contend they only pled "ordinary" negligence, they tried the case as an ordinary negligence claim and, therefore, the trial court properly denied Defendant's negligent hiring instruction and instructed the jury on ordinary negligence. We therefore consider the relevant theories of negligence in the context of the facts of this case—looking to Plaintiffs' complaint and the evidence presented at trial within the context of precedent governing both ordinary negligence and negligent hiring.

1. **Plaintiffs' Complaint**

Although Plaintiffs contend they only pled ordinary negligence, the nature of Plaintiffs' cause of action is not controlled by how Plaintiffs labeled it in their complaint—"*it is not the titular designation that controls*; the nature of the cause of action is determined by the facts alleged." *Burton v. Dixon*, 259 N.C. 473, 477, 131 S.E.2d 27, 30 (1963); *see also*, *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 52, 790 S.E.2d 657, 660 (2016). Plaintiffs' complaint properly alleged an employer/employee relationship between Defendant and Ms. Clark, that Ms. Clark was assigned to work at Plaintiffs' home by Defendant, and that Ms. Clark was responsible for the events of 29 September 2016. Plaintiffs further alleged that they "relied on Health-Pro to assign quality aides to their home who would . . . treat [Plaintiffs] properly, and who would not steal or otherwise engage in inappropriate or harmful behavior." Ms. Clark "was able to gain extensive information about [Plaintiffs] and their home including, but not limited to, how to enter and exit the home, details of [Plaintiffs'] personal property and other assets, and the location of valuables within the home[,]" therefore it "was reasonably foreseeable, including to Health-Pro, that [Ms.] Clark would have access to this information as a result of her being assigned to" work in Plaintiffs' home. "In the fall of 2015, [Plaintiffs] discovered that approximately $90.00 in rolled coins had been stolen from a box inside their home." "In July or August 2016, . . . [a]pproximately $1,200.00 was stolen from [Mrs. Keith's] dresser drawer, and $90.00 was stolen from Mr. Keith's wallet." "Mr. Keith [ ] told [Mr.] Bailey of the missing funds. [Mr.] Bailey identified two potential employees whom he suspected, one

of whom was [Ms.] Clark[.]" Mr. Bailey "assured [Plaintiffs] that neither [of the two employees] would be assigned to [Plaintiffs'] home" in the future. "Unfortunately, Health-Pro again assigned [Ms.] Clark to [Plaintiffs'] home." Plaintiffs contended that because "they relied on Health-Pro aides to take care of them," they "essentially were forced to accept aide assignments made by Health-Pro." "[Ms.] Clark orchestrated [the 29 September 2016] home invasion and robbery of [Plaintiffs] along with two male accomplices." "[Ms.] Clark and the two male accomplices stole" the $1,000.00 from the ATM, and "over $500.00 in coins as well as a gun[.]"

"[T]he morning following the robbery[,] [Ms.] Bailey admitted that [Ms.] Clark was involved . . . and . . . was being terminated[.] [Ms.] Bailey also revealed that Health-Pro had some prior knowledge of a criminal record concerning [Ms.] Clark." Plaintiffs alleged Ms. Bailey made a public statement "that Health-Pro . . . had conducted an 'extensive background check' on [Ms.] Clark and that the background check was clean." "Upon information and belief, Health-Pro did not perform a criminal background check on [Ms.] Clark before assigning her to [Plaintiffs'] home" but, if it did, "Health-Pro ignored the results in assigning [Ms.] Clark to perform work on behalf of [Plaintiffs]." Plaintiffs alleged Ms. Clark's criminal history prior to 29 September 2016 consisted of the following convictions: "2008: found guilty of driving while license revoked;" "2009: found guilty of possession of drug paraphernalia;" and "2010: found guilty of criminal contempt[.]" Plaintiffs also included charges for which Ms. Clark was not convicted: "2010: charge for possession of drug paraphernalia;" "2010: charge for communicating threats (dismissed because of non-cooperating witness);" and "2011: charge for communicating threats (dismissed because of non-cooperating witness)."

Plaintiffs stated "upon information and belief, Health-Pro did not perform a driver's license check on [Ms.] Clark before assigning her to work . . . in [Plaintiffs'] home, including to drive [Mrs. Keith.]" "If Health-Pro did perform a driver's license check on [Ms.] Clark, Health-Pro ignored the results in assigning her to work as an aide in [Plaintiffs'] home," even though Ms. Clark "did not have a valid driver's license." Plaintiffs further alleged that "[Ms.] Clark also maintained a public Facebook page, which Health-Pro easily could have accessed. The Facebook page contains several posts further suggesting that [Ms.] Clark should not have been assigned to work as an in-home aide[,]" though "[i]t may have been acceptable for Health-Pro to hire [Ms.] Clark and assign her to another position besides providing in-home care services, such as an 'office only' position." Plaintiffs concluded that "Health-Pro knew or should have known of [Ms.] Clark's criminal background and lack of a valid

driver's license, as well as related facts establishing that [Ms.] Clark should not have been assigned to provide in-home care to [Plaintiffs,]" and "Health-Pro continued to assign [Ms.] Clark to provide in-home care to [Plaintiffs]" despite these facts.

Plaintiffs alleged that Defendant "had a duty to assign employees as aides to [Plaintiffs'] home with reasonable care, including properly screening its employees in order to decide which employees could be assigned to such positions[.]" Further,

> Health-Pro had a duty to not assign [Ms.] Clark to work as an aide providing in-home care on behalf of Health-Pro when it became aware of, or in the exercise of reasonable care should have become aware of, [Ms.] Clark's criminal record and driving record, as well as any other pertinent facts associated with her background or her actions on behalf of Health-Pro, including any inappropriate behavior, theft, or other concerns.

Plaintiffs then alleged that Defendant "carelessly and heedlessly was negligent in that it:" "failed to adopt and/or properly implement and enforce appropriate company policies regarding criminal background and driving record checks for employees . . . that would be assigned to work as in-home aides;" knew of Ms. Clark's unfitness to work as an in-home aide, or "failed to investigate and become aware of [Ms.] Clark's criminal background and driving record, including her lack of a driver's license, as well as other pertinent facts regarding her background before assigning her to work as an in-home aide;" "continued to assign [Ms.] Clark to provide in-home care to [Plaintiffs] after becoming aware of" these facts which made Ms. Clark unfit to work in Plaintiffs' home; and "knew of prior thefts at [Plaintiffs'] home, and that [Ms.] Clark was a primary suspect who consequently should have no longer been assigned to work at [Plaintiffs'] home," but "continued to assign [Ms.] Clark to provide in-home care to [Plaintiffs] despite . . . assurances it would no longer do so[.]"

Plaintiffs allege that Defendant's actions and inaction "recklessly created a dangerous situation for [Plaintiffs] . . . by continuing to assign to provide in-home care services an unsafe individual with a criminal history who lacked a valid driver's license[,]" the Defendant "had the ability to assign [Ms.] Clark to a different position other than providing in-home care services to . . . [Plaintiffs], but it recklessly continued to assign [Ms.] Clark to work as an in-home aide[,]" and that Defendant "knew or should have known that its actions and inactions described herein were reasonably likely to result in injury, damage, or other harm

to [Plaintiffs.]" Plaintiffs concluded: "The September 29, 2016 home invasion and robbery was a direct result of Health-Pro assigning [Ms.] Clark to provide in-home care services and thereby allowing her continuing access to [Plaintiffs] and their home[,]" and that Defendant's "conduct, undertaken with a reckless disregard for the safety of others . . ., was undertaken by Health-Pro's owners, officers, directors, or members of its management and, at the very least, was condoned by Health-Pro's owners and management."

2. **Evidence at Trial**

Defendant argued at trial that Plaintiffs' complaint alleged a cause of action for negligent hiring, not ordinary negligence, based in part on the testimonial evidence. For example, the following exchange occurred during the direct examination of Mr. Keith:

> Q. When you [Mr. Keith] hired Health-Pro did you ever speak to anybody from the company?
>
> A. Oh, yes, Mr. Bailey *and all the girls that worked for us*.
>
> Q. Do you remember anyone saying anything about *background checks*?
>
> A. *No*, not offhand, no.
>
> . . . .
>
> Q. [D]id you *have an understanding about background checks, about whether or not they would be run*?
>
> . . . .
>
> A. *I thought [background checks] had been [conducted]*, yes.
>
> . . . .
>
> Q. Did anyone from Health-Pro ever *tell you* if *she didn't have a driver's license*?
>
> A. *No*.
>
> . . . .
>
> Q. Did anyone *tell you* anything about her *Facebook posts*?
>
> A. *No*.

Q. When she was *assigned* to your home *did you assume that she had been fully screened* by Health-Pro?

A. *Yes*, I did.

. . . .

Q. Did you trust Health-Pro to *assign her only if she was going to be . . . safe* to have in the home?

A. I never really discussed that with them.

. . . .

Q. *Not pose a danger*?

A. *Yes*.

. . . .

Q. At some point, Mr. Keith, did y'all start having money missing from your home?

A. Yes.

. . . .

Q. Did anyone *tell Health-Pro* about this?

A. *I did*, *yes*.

Q. And *what happened*?

A. *I didn't see anything happen*. We were *told that they would look into it*. And after that nothing happened.

Q. Was [Ms.] Clark *pulled from the home for a period of time*?

A. *Yes*, *at one time she was*.

Q. Was that *when the money was missing*?

A. *Yes*.

Q. Was *that when Health-Pro said they would look into it*?

A. *Yes*.

. . . .

Q. *Do you know why she was put back in the home*?

A. I assume they needed her for the work.

. . . .

Q. Did *you assume that before she had been put back in the house that Health-Pro had done an investigation*?

A. I didn't know anything about an investigation. *I didn't know that there was any need for one.*

Q. Well, *when they pulled her* from the home when the money was missing *did you understand that they were looking into what happened*?

A. *Yes*, *they pulled two of the girls at the same time*, [Ms. Clark] and one other [Ms. Little].

. . . .

Q. That period in 2016 *when money was missing*, was *[Ms. Clark] working in your home* during that period?

A. She was working there, yes. *I don't know if she was in the house when it went missing or no*t.

(Emphasis added). Plaintiffs also introduced two letters from the Pitt County Child Support Agency requesting Ms. Clark's employment information because the agency was "required by law to investigate the possibilities of obtaining child support for child(ren) entitled to parental support. [The law] requires employers to provide certain . . . information so that child support may be collected or enforced." During cross-examination, Mr. Keith testified as follows:

Q. . . . . You were the one that had most of the business dealings with [Defendant] during the time that Health-Pro came in. And *during the time that you used their services from 2012 through the first half of 2016 you didn't have any concerns with the aides* they were sending into your home, *correct*?

A. *Yeah.*

Q. Okay. And, in fact, *you had no problems with any of the aides in your home until later in 2016*, correct?

A. We had *problems with one or two of them*, *but they were personality problems.*

. . . .

Q. *One of the aides* you had a problem with was *[Ms.] Little?*

A. *Yes.*

. . . .

A. [Ms. Little] had problems with my family not me.

. . . .

Q. I want to turn your attention to the money that went missing from your home around August 2016, sir.

. . . .

Q. *Is it fair to say that you don't know which aide, if any, took money from the home*?

A. *No, I didn't.*

. . . .

Q. At any given time there were usually three or four aides circulating through the home throughout the day?

A. Three or four aides during the day, there was only one at a time.

. . . .

Q. And you testified in your deposition *you were satisfied with how Mr. Bailey handled your complaints* about the missing money, correct?

A. *Yes.*

Q. And, sir, talking about Ms. Clark herself. *Prior to September 29th you had never had any concerns or problems with Ms. Clark in your home*, correct?

A. *No.*

. . . .

Q. [Ms. Clark] was *never verbally abusive to you or M[r]s. Keith*, correct?

A. *No.*

Q. She was *never physically abusive to you or M[r]s. Keith*?

A. No.

. . . .

Q. Do you recall testifying that in your deposition that your *daughter had an issue with Ms. Little*?

A. *Yes*.

Q. Okay. And *Ms. Little was removed from the home at the same time Ms. Clark* was, correct?

A. I assume so, *within days*.

Q. And *Ms. Little did not return to your home*, correct?

A. *No*.

. . . .

Q. You testified in your deposition that *you could have refused* to have Ms. Clark come back into the home, correct?

A. *Yes*.

Q. Okay. And you testified in your deposition that *you never felt forced to have Ms. Clark back into your home* at any point, correct?

A. *That's correct*.

(Emphasis added). Mrs. Keith's testimony was generally in line with Mr. Keith's testimony above, including the questions about whether Defendant had informed her about any background checks on Ms. Clark, told her Ms. Clark did not have a valid driver's license, informed her of any concerning Facebook posts, and asked her about the facts surrounding the missing money. She also testified:

Q. Did [Ms. Clark] ever drive you places?

A. I can't remember. At that time we were changing so many employees that I lost track who drove me where.

Q. Do you think if she was there during the day and you needed to go somewhere she might have been one of the ones to drive you somewhere?

A. It's possible, but I never had a problem with any of the drivers.

. . . .

> Q. Do you remember money going missing?
>
> . . . .
>
> A. I think it's my fault because I let someone see me take some money out of my dresser drawer and I didn't think much of it, but I was dumb enough to keep it where it was, same location and told Mr. Bailey about it and he asked permission to check my dresser drawer out, drawers. . . . . And after that there was nothing said about it, but [Ms. Clark] was absent for two days.[3] Then all of a sudden she was back and I was quite surprised.
>
> . . . .
>
> A. I didn't ask for her. They couldn't find someone and apparently she was there again. . . . *I didn't think she had any problems because she's back working for me again.*
>
> . . . .
>
> [A.] I had *thought that she had been checked out because – I just thought she had been* that's why she – wound up coming back.

(Emphasis added). Mrs. Keith testified on cross-examination:

> Q. *[Y]ou don't know if that person* [that Mrs. Keith believed she saw when she was removing some money from her dresser drawer] *was [Ms.] Clark*, right?
>
> A. *It's possible*, but I – all I saw was an arm and *at that time* [when she believed she saw one of the aides nearby as she was removing money], as I said previously, we were having *a changeover of personnel. Frankly, I don't remember who was on what nights.*
>
> . . . .
>
> Q. [W]hat it says [in your deposition is], *Did you suspect any particular aide of taking that money*, correct?
>
> A. *Yes.*
>
> Q. Okay. And then *your response up at the top was no*, correct?

3. The evidence shows that Ms. Clark was working at a different household for Defendant for at least two to three weeks before being returned to Plaintiffs' home.

A. *Yes*.

. . . .

Q. I want to talk about [Ms.] Clark, herself, with you. *You have characterized her in your deposition testimony as nice and pleasant*, correct?

A. *Yeah*.

Q. And prior to the night of September 29th *you never had any concerns about Ms. Clark being an aide in your home*, correct?

. . . .

A. *No*, I – because *they always mentioned we check our people out*.

Q. And you also testified previously that *when she returned* to your home in early September of 2016, that *you kept a closer eye on her but there wasn't anything going on*, correct?

A. No, but there had to be something going on.

Q. But *you didn't have any uneasy feeling or suspicion about Ms. Clark being in your home during that time frame*, correct?

A. *No*, . . . she never talked much. Very quiet.

Q. And do you recall . . . testifying in your deposition that . . . *there was nothing that Ms. Clark did that alerted you to her being involved in September 29th's events prior to those events*, correct?

A. I wouldn't know, *I never saw her do anything or take anything*, so –

(Emphasis added).

Plaintiffs' children, Frederick, Sarah Keith ("Sarah"), and Margret Keith ("Margret"), were also questioned thoroughly by Plaintiffs' attorney concerning whether they were informed by Defendant about Ms. Clark's criminal record, invalid driver's license, and Facebook posts.

During the charge conference, Defendant's attorney argued that the trial court should give an instruction on negligent hiring, supervision, or retention. Plaintiffs' attorney argued against giving that instruction,

contending that Plaintiffs' action was one of ordinary negligence. The trial court ruled in favor of Plaintiffs and only charged the jury on ordinary negligence.

3. **"Ordinary" Negligence**

[1] Plaintiffs contend that they properly pled ordinary negligence, and only ordinary negligence; in part because their complaint only included a claim titled "negligence," nowhere mentioned "negligent hiring"; and that "ordinary" negligence was the only claim they pursued at trial. They therefore argue that the trial court was correct to deny Defendant's motions for directed verdicts and a JNOV, that the trial court did not err in refusing Defendant's request to instruct on negligent hiring, and that the jury was properly instructed on "ordinary" negligence as the sole theory of Defendant's liability.

Defendant argues that Plaintiffs' allegations and the facts of this case constituted a claim for negligent hiring and, therefore, Plaintiffs were obligated under law to prosecute their claim as one for negligent hiring. We agree with Defendant.

In arguing that the general requirements of an action in ordinary negligence were appropriately applied in this case, Plaintiffs argue that "a contractual relationship can give rise to the duty of ordinary care." However:

> The law imposes upon every person who enters upon an active course of conduct the positive duty to use ordinary care to protect others from harm and a violation of that duty is negligence. *It is immaterial whether the person acts in his own behalf or under contract* with another. An act is negligent if the actor intentionally creates a situation which he knows, or should realize, is likely to cause a third person to act in such a manner as to create an unreasonable risk of harm to another. Restatement, Torts [§] 302, 303.

Toone v. Adams, 262 N.C. 403, 409, 137 S.E.2d 132, 136 (1964) (emphasis added) (citation omitted). Our Supreme Court in *Toone* further discussed the limited relevance of contractual obligations when the plaintiff decides to bring the action in tort instead of contract:

> It is well settled in North Carolina that where a contract between two parties is intended for the benefit of a third party, the latter may maintain an action in contract for its breach or in tort if he has been injured as a result of

> its negligent performance. The parties to a contract impose upon themselves the obligation to perform it; the law imposes upon each of them the obligation to perform it with ordinary care and they may not substitute a contractual standard for this obligation. *A failure to perform a contractual obligation is never a tort unless such nonperformance is also the omission of a legal duty.* The contract merely furnishes the occasion, or creates the relationship which furnishes the occasion, for the tort.

Id. at 407, 137 S.E.2d at 135 (emphasis added). Plaintiffs do not cite any authority that tends to show Defendant's duty to Plaintiffs was somehow more comprehensive due to the contract between them. We agree with Plaintiffs that, due to their contract with Defendant, Defendant had the duty of reasonable care in selecting applicants, including Ms. Clark, that were fit persons to work as in-home aides. However, that duty would exist even if there was no express contract between Plaintiffs and Defendant. *Id.* at 409, 137 S.E.2d at 136. Defendant's general duty to Plaintiffs in relation to the acts of Ms. Clark is no different because of the contractual relationship between Plaintiffs and Defendant—Defendant had a duty to exercise due care in hiring Ms. Clark, and that duty of due care continued throughout Ms. Clark's employment. *Id.* We note that the Rhode Island case cited by Plaintiffs, *Welsh Mfg. v. Pinkerton's, Inc.*, 474 A.2d 436 (R.I. 1984), was a negligent hiring or supervision case. *Id.*, at 442-44; *see also id.* at 441 (citation omitted) ("An employer's duty does not terminate once an applicant is selected for hire. Other courts have stated that an employer has a duty to retain in its service only those employees who are fit and competent."). That is not to say the terms of the contract cannot be considered as part of the factors establishing the *context* from which the trial court or jury determines the "reasonably prudent person" baseline.

Plaintiffs contend: "The duty of ordinary care applies to a broad range of conduct. Indeed, this Court has found an ordinary negligence instruction proper in a host of circumstances, including those implicating other areas of the law." However, Plaintiffs cite no case stating an employer can be held liable for the criminal actions of its employee in an ordinary negligence action. Plaintiffs provide the following legal precedent for their argument: "For example, in *Klinger v. SCI North Carolina Funeral Services., Inc.*, [189 N.C. App. 404, 659 S.E.2d 99 (2008)] (unpublished), this Court affirmed a trial court's use of an ordinary negligence instruction in a case about mishandling of a corpse. *Id*[.]" *Klinger* is an unpublished case, has no precedential value, involves statutory law regulating the disposition of human remains that is no

longer in effect, and the issue of "duty" was decided pursuant to the relevant statutes. *Id*.

Plaintiffs' additional cite in support of its position, *Peal ex rel. Peal v. Smith*, 115 N.C. App. 225, 444 S.E.2d 673 (1994), *aff'd by equally divided court*, 340 N.C. 352, 457 S.E.2d 599 (1995) (underlining added), is also an opinion without precedential value. *Peal By Peal v. Smith*, 340 N.C. 352, 457 S.E.2d 599 (1995) (when the votes in an opinion by our Supreme Court are equally divided, "the decision of the Court of Appeals is left undisturbed and stands without precedential value"). Plaintiffs contend: "Similarly, in *Peal*, this Court used an ordinary negligence analysis in what the parties had concluded was a dram shop case. This case is no different." (citations omitted). We disagree. In *Peal*: "The plaintiff . . . instituted a claim based in [ordinary] negligence against Defendant Smith and against his employer, Cianbro." *Peal*, 115 N.C. App. at 229, 444 S.E.2d at 676–77. This Court in *Peal* relied in part on Restatement (Second) of Torts § 317, which states:

> [An employer] is under a duty to exercise reasonable care so to control his [employee] while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the [employee]
>
> (i) is upon the premises in possession of the [employer] or upon which the [employee] is privileged to enter only as his [employee], or
>
> (ii) is using a chattel of the [employer], and
>
> (b) the [employer]
>
> (i) knows or has reason to know that he has the ability to control his [employee], and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 317 (1965). Concerning section 317(a)(ii), our Supreme Court has noted in a negligent hiring case: "A review of our pertinent case law reveals no support for the application of this particular section of the Restatement. We find no case in which liability has been imputed to an employer solely on the basis of an employee 'using a chattel of the [employer].' We decline to recognize this theory of liability in the situation presented in this case." *Braswell*

v. Braswell, 330 N.C. 363, 375, 410 S.E.2d 897, 904 (1991). Our review uncovers five North Carolina opinions citing Restatement (Second) of Torts § 317, including *Peal* and *Braswell*. In none of these opinions has "liability [ ] been imputed to an employer solely on the basis of" section 317. *Id*. In *Peal*, this Court held: "the common law duty of [an employer] to control his [employee] under certain circumstances as outlined in Restatement § 317, taken together with the [employer's] own written policies established a standard of conduct that if breached could result in actionable negligence." *Peal*, 115 N.C. App. at 233, 444 S.E.2d at 679. In light of the equally divided decision of our Supreme Court in *Peal*, rendering it without precedential value, we decline to adopt the analysis in *Peal*. We need not decide whether Restatement § 317 states a separate common law theory of negligence recognized in North Carolina, as Ms. Clark, on 29 September 2016, was neither on Defendant's premises or in a place she was "privileged to enter" at that time, nor did Defendant have any ability or opportunity to control Ms. Clark on 29 September 2016, or know of any necessity to do so and, therefore, the facts in this case do not meet the requirements as set forth in section 317. Restatement (Second) of Torts § 317.

We hold that, on the facts before us, the only action pled in Plaintiffs' complaint was one for negligent hiring. As made clear by the allegations in the complaint itself, as well as the testimony and other evidence presented at trial, Plaintiffs' allegations break down as follows: (1) Defendant's investigation into Ms. Clark's background was insufficient; (2) facts from Ms. Clark's background and application for employment that Defendant either knew, or should have known, made Ms. Clark unfit to be an in-home aide in Plaintiffs' home; (3) once Defendant learned about the two incidents when money was taken from Plaintiffs' home, and identified Ms. Clark as one of two aides who were working in Plaintiffs' home during the relevant time periods, which initially led to both aides being removed from Plaintiff's home, Defendant should not have returned Ms. Clark to service in Plaintiffs' home; (4) additionally, Defendant's investigation of Ms. Clark following the money incidents was insufficient; and (5) Defendant should have considered the two child support notices as a motive indicating Ms. Clark's responsibility for the thefts from Plaintiffs' home.

All of Plaintiffs' relevant allegations and evidence directly challenge whether Defendant should have hired Ms. Clark as an in-home aide; whether Defendant acted appropriately in response to hearing from Plaintiffs that money had been taken from their home on two occasions—which would have involved either greater supervision of—such as moving Ms. Clark to a no-client-contact position, as suggested by

Plaintiffs—or a decision regarding whether to retain her in Defendant's employ at all. Plaintiffs have cited no binding authority for the proposition that an action brought on allegations, and tried on facts, that clearly fall within the scope of a negligent hiring claim may avoid the heightened burden of proving all the elements of negligent hiring by simply designating the action as one in ordinary negligence, and we find none. Were we to accept Plaintiffs' arguments, it is unclear what relevance the firmly-established doctrine of negligent hiring would retain in North Carolina—it is difficult to foresee a circumstance where a plaintiff would choose to bring a negligent hiring action instead of an action in ordinary negligence. The evolution of employer liability jurisprudence, which includes the common law development of the negligent hiring doctrine for the purpose of *expanding* the limits of employer liability to third parties injured by the acts or omissions of employees, strongly suggests the doctrine of negligent hiring was intended as the *sole* means of imposing liability on employers who, as in this case, are alleged to have created circumstances by which their own negligent acts or omissions—their failure to exercise due care in protecting third parties from dangerous employees—were the proximate cause of injury to a third party. Noting that resolution of all negligence claims, including negligent hiring claims, is always a highly fact specific undertaking, we hold, on the facts of this case, that the sole claim alleged in Plaintiffs' complaint was one for negligent hiring, retention, or supervision. In this case, it was error for this action to proceed as a claim in ordinary negligence, and the trial court erred in denying Defendant's request for the jury to be instructed accordingly. This error was clearly prejudicial and would normally require a new trial. However, Defendant's motions for a directed verdict and a JNOV were argued pursuant to negligent hiring, as Defendant correctly contended that the facts as alleged and presented at trial only supported a negligent hiring claim.

In addition, in light of Plaintiffs' intention to proceed under an ordinary negligence theory, Defendant also moved for a directed verdict based on insufficiency of the evidence to support that alleged claim, beginning its argument as follows:

> In order to succeed on [negligent hiring]—and even in an ordinary negligence case [ ] Plaintiffs have to show that the events of September 29th, 2016, and [Ms.] Clark's unfitness and participation in those events were foreseeable to my clients. Those are the events that have caused [ ] Plaintiffs the only injury they complain of. And there is nothing in the record that suggests that it was foreseeable.

Defendant's motion for a directed verdict at the close of all the evidence, as well as its motion for a JNOV after the verdict, were renewals of these arguments.

We hold that the trial court erred in denying Defendant's motions with respect to ordinary negligence, as that claim was not properly before the trial court, and no evidence could support it. We therefore reverse and remand with instruction to the trial court to enter an order granting Defendant a JNOV on Plaintiffs' claim in ordinary negligence. Plaintiffs argued to the trial court that their claim was solely based in ordinary negligence, and that it did not include any claim pursuant to negligent hiring. They maintain that argument on appeal. Therefore, our holding would normally end the matter.

However, because there is a possibility that Plaintiffs will try and file an action against Defendant for negligent hiring, we believe it is appropriate to consider Defendant's motion for a JNOV based upon negligent hiring. As Plaintiffs implicitly acknowledge by several statements such as "the jury could have—and would have—reached the same conclusion, regardless of the instruction it was given[,]" the facts Plaintiffs presented to the jury would not have been different had they proceeded under a negligent hiring theory. We therefore consider Defendant's argument that Plaintiffs' evidence was insufficient to survive Defendant's motion for a JNOV based upon the theory of negligent hiring. We note that neither party has suggested Plaintiffs' evidence could support an action based upon *respondeat superior*, and we hold that, even if such a claim had been made, Plaintiffs' evidence could not support it.

4. **Negligent Hiring, Retention, and Supervision**

We therefore continue our analysis by conducting a review based upon a claim for negligent hiring, which Defendant contends is the only basis upon which Plaintiffs' negligence claim should have been submitted to the jury. After review of Plaintiffs' complaint and the facts developed at trial, we have determined that a claim for negligent hiring was properly pled, and evidence tending to support at least certain elements of such a claim was introduced at trial. Therefore, we review the evidence to determine whether the evidence was sufficient to survive Defendant's motion for a JNOV.

a. Standard of Review

In an action based upon negligent hiring, "there must be a duty owed by the employer to the plaintiff in order to support an action for negligent hiring." *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 587,

615 S.E.2d 45, 48 (2005), *aff'd per curiam*, 360 N.C. 164, 622 S.E.2d 494 (2005). "It is only after a plaintiff has established that the defendant owed a duty of care that the trial court considers the other elements necessary to establish a claim for negligent hiring or retention[.]" *Id.* at 588, 615 S.E.2d at 49 (citation omitted).

> Once that duty is established then the plaintiff must prove four additional elements to prevail in a negligent hiring and retention case: "(1) the independent contractor acted negligently; (2) he was incompetent at the time of the hiring, as manifested either by inherent unfitness or previous specific acts of negligence; (3) the employer had notice, either actual or constructive, of this incompetence; and (4) the plaintiff's injury was the proximate result of this incompetence."

Id. at 587, 615 S.E.2d at 48 (2005).

Along with the general requirements a plaintiff must prove in order to establish an employer's duty of care, this Court has identified three specific elements that must be proven in order to show that an employer had a duty to protect a third party from its employee's negligent or intentional acts committed outside of the scope of the employment:

> One commentator, in analyzing the requisite connection between plaintiffs and employment situations in negligent hiring cases, noted three common factors underlying most case law upholding a duty to third parties: (1) the employee and the plaintiff must have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff must have met the employee[, "when the wrongful act occurred,"] as a direct result of the employment; and (3) the employer must have received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff [that resulted in the plaintiff's injury].

Id. at 587-88, 615 S.E.2d at 49. This Court "decline[s] to hold employers liable for the acts of their . . . employees under the doctrine of negligent hiring or retention when *any one* of these three factors was not proven." *Id.* at 588, 615 S.E.2d at 49 (citations omitted).

b. Defendant's Duty of Care Under *Little*

[2] Plaintiff argues that the requirements as set forth in *Little* do not control in this case. We disagree. In *Little*, this Court held:

> In the instant case [the employee] was not in a place where he had a legal right to be since he broke in to plaintiffs' home; [the employee] and plaintiffs did not meet as a direct result of [the employee's] relationship with defendants, since [the employee] did not enter plaintiffs' home as a salesman; finally, defendant[-employers] received no benefit, direct, indirect or potential, from the tragic "meeting" between [the employee] and plaintiffs. We have found no authority in North Carolina suggesting that defendant [-employers] owed plaintiffs a duty of care on these facts, and we hold that in fact none existed.

Id.[4]

We find the facts in this case analogous; Ms. Clark had no legal right to be at Plaintiffs' home, as a co-conspirator in the breaking and entering of Plaintiffs' home, that resulted in the robbery and kidnapping; Ms. Clark's presence at Plaintiffs' home on 29 September 2016 was not "as a direct result of [her] relationship with [Defendant], since [Ms. Clark] did not [constructively] enter plaintiffs' home as a[n in-home aide]"; and "[D]efendant[ ] received no benefit, direct, indirect or potential, from the tragic 'meeting' between [Ms. Clark] and [P]laintiffs." *Id.* Although, unlike the employee in *Little* who did not know his victim, Ms. Clark had worked for Plaintiffs for nearly a year, we hold, *on the facts of this case*, that these elements are necessary to establish Defendant's duty to protect Plaintiffs, and there is no evidence that supports any of these three elements. We examine the facts of this case in detail below. For these reasons, we hold that Plaintiffs' evidence was insufficient to survive Defendant's motion for a JNOV, and reverse and remand for entry of a JNOV in favor of Defendant on any negligent hiring, supervision, or retention claim based on the events of 29 September 2016. We recognize that the jury was not instructed on negligent hiring, but Defendant's motion for a JNOV was a renewal of his motions for directed verdicts, the denial of which also constituted prejudicial error to Defendant demanding this result.

We note that the *Little* requirements are associated with proving an employer's *duty of care*, not proximate cause. These elements go to the foreseeability that an employee will commit a wrongful act against a specific plaintiff, as well as differentiating between acts committed under color of the employee's employment with the employer—for

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4. *Little* involved an independent contractor of the employer, not an employee, but this distinction does not affect our analysis.

which the employer may have had a duty to act to prevent, and acts committed by the employee acting wholly independent of her status as the employer's employee—for which the employer normally would not have had a duty to act to prevent. Nonetheless: "It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct." Restatement (Second) of Torts § 302B(f.) (1965). Therefore, we do not dismiss the possibility that under an extraordinary set of facts an employer may have a duty to protect a third party from a negligently hired employee even though one or more of the factors set forth in *Little* are not met. "What is meant by legal duty . . . varies according to *subject matter and relationships*." *O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 181, 352 S.E.2d 267, 270 (1987) (emphasis added) (citation omitted).

c. Defendant's Liability Notwithstanding the *Little* Requirements

Assuming, *arguendo*, the requirements set forth in *Little*, 171 N.C. App. at 587-88, 615 S.E.2d at 49, are not applicable in this case, we still find that the trial court erred in denying Defendant's motion for a JNOV based on a theory of negligent hiring.

"[T]he concept of negligence is composed of two elements: legal duty and a failure to exercise due care in the performance of that legal duty[.]" *O'Connor*, 84 N.C. App. at 181, 352 S.E.2d at 270 (citation omitted). Therefore, absent the *Little* requirements, Plaintiffs still had the burden of proving Defendant owed them a duty to protect them from Ms. Clark's criminal acts of 29 September 2016. "Negligence ' "presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty which either arises out of a contract or by operation of law." ' 'If there is no duty, there can be no liability.' " *Prince v. Wright*, 141 N.C. App. 262, 266, 541 S.E.2d 191, 195 (2000). Further,

> the *presumption is that the [employer] has properly performed his duty in selecting his [employees]*, and before responsibility for negligence of [an employee] proximately causing injury to plaintiff . . . can be fixed on the [employer], it must be established by the greater weight of the evidence, the *burden being on the plaintiff*, that [the plaintiff] has been injured by reason of carelessness or negligence . . . *and that the [employer] has been negligent in employing or retaining such incompetent [employee], after knowledge of the fact [of the employee's unfitness]*, either actual or constructive.

Pleasants v. Barnes, 221 N.C. at 177, 19 S.E.2d at 629 (emphasis added) (citations omitted). As stated in the Second Restatement:

> It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence (see §§ 291- 293), it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it.

Restatement (Second) of Torts § 302B(f.) (1965). Further,

> Normally the actor has much less reason to anticipate *intentional* misconduct than he has to anticipate negligence. In the ordinary case he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true *particularly where the intentional conduct is a crime*, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law. Even where there is a recognizable possibility of the intentional interference, the possibility may be so slight, or there may be so slight a risk of *foreseeable* harm to another as a result of the interference, that a reasonable man in the position of the actor would disregard it.

Restatement (Second) of Torts § 302B(d.) (1965). This Court has recognized the rule that normally an employer will not be expected to anticipate criminal acts of its employee:

> As a general rule "[n]o person owes a duty to anyone to anticipate that a crime will be committed by another, and to act upon that belief." 57 Am. Jur. 2d Negligence Section 63 (1971). However, a duty to afford protection of another from a criminal assault or willful act of violence of a third person may arise, at least under some circumstances, if that duty is voluntarily assumed. *Id*.

O'Connor, 84 N.C. App. at 182, 352 S.E.2d at 270. This Court has recognized that when " 'the particular assault was not committed within the scope of the employment' ":

> [E]mployers of certain establishments can [only] be held liable to an invitee therein assaulted by an employee of the place of business whom the employer "knew, or in the exercise of reasonable care in the selection and supervision of his employees should have known, to be likely, by reason of past conduct, bad temper or otherwise, to commit an assault, even though the particular assault was not committed within the scope of the employment."

Stanley v. Brooks, 112 N.C. App. 609, 611, 436 S.E.2d 272, 273 (1993) (citation omitted). Actions for negligent hiring require two distinct "foreseeability" requirements. First, was the injury allegedly sustained by the third party due to the acts of the employee of a kind reasonably foreseeable by the employer, thereby creating a duty to protect the third party. Second, if the employer's duty to protect is proven, there is a foreseeability requirement for proving the employer's negligence was the proximate cause of the third party's injury and damages. *Stein v. Asheville City Bd. Of Educ.*, 360 N.C. 321, 328 n.5, 626 S.E.2d 263, 268 n.5 (2006) (citation omitted) (just as with the element of duty, "[f]oreseeability is also an element of proximate cause[,]" but when the reviewing court "hold[s] no duty existed, [it is] not [required to] reach the question of proximate cause"). These foreseeability analyses may overlap considerably since both require application of the same set of facts to the law. Employers in certain kinds of businesses—and we find Defendant's business to fall into this category—have an enhanced general duty to insure their employees are fit to undertake the employment for which they are hired—these are generally businesses that involve dangerous equipment or activities, and businesses where the employee will come in frequent contact with the general public or particular individuals. More care is required when hiring someone for jobs involving the use of explosives, flying aircraft, or providing medical care, for example, than for working at a typical desk job. However, even when there is a general duty of care, the plaintiff must still demonstrate that the employer had a specific duty to protect the plaintiff from injury of a kind similar to the actual injury resulting from the employee's acts.

The initial question in a negligent hiring action is did the employer use reasonable care before hiring an employee, taking into account the particular skills or character traits required to safely perform in the position. If the employer used reasonable care before hiring an employee

in light of the particularities of the job, and the employer continued to use reasonable care in supervising and retaining the employee, then the employer cannot be held liable for acts of the employee, not occurring in the course the employment, that cause injury to a third party. Importantly, even when the employer fails to act with due care in the hiring, supervision, or retention of an employee, the employer is *only* liable to third parties for the employee's acts outside of employment if the employee's acts *are of a kind* that were reasonably foreseeable *based solely on the characteristics of the employee that made the employee unfit for the position*, and only those disqualifying characteristics of which the employer *actually knew*, or would have discovered *had the employer acted with due care*. *Stanley v. Brooks*, 112 N.C. App. 609, 611, 436 S.E.2d 272, 273 (1993) (the plaintiff must prove "that the injury complained of resulted from the incompetency" rendering the employee unfit, and the employer's actual or constructive knowledge of the employee's particular unfitness).

In this case, in order to prove that Defendant had a duty to protect Plaintiffs from Ms. Clark's criminal acts, Plaintiffs had to prove that, based upon all the information Defendant knew, or, exercising due care should have known, a reasonable person would have foreseen that Ms. Clark was likely to conspire with dangerous individuals to perpetrate a home invasion robbery against Plaintiffs, by breaking into the house, controlling Plaintiffs by the use of firearms, and forcing Mr. Keith to drive to an ATM to obtain more cash—*or* some other criminal act against Plaintiffs of a similar nature and severity. *Murphey v. Georgia Pac. Corp.*, 331 N.C. 702, 706, 417 S.E.2d 460, 463 (1992) (the plaintiff must prove that "a person of ordinary prudence could have reasonably foreseen that such a result or some similar injurious result was probable") (citation omitted).

We first review the evidence to decide whether it was sufficient, pursuant to the doctrine of negligent hiring, to demonstrate Defendant had a duty to protect Plaintiffs from Ms. Clark's criminal acts on 29 September 2016. Adapting the standard as set forth by our Supreme Court to align with the facts of this case:

> With regard to the first element, [Defendant] ha[d] a duty to exercise due care in [hiring and supervising Ms. Clark]. The standard of due care is always the conduct of a reasonably prudent person under the circumstances. Although the standard remains constant, the proper degree of care varies with the circumstances.

Bolkhir v. N. Carolina State Univ., 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988) (citations omitted). Further, "the presumption is that the [employer] has properly performed his duty in selecting his [employees.]" *Pleasants*, 221 N.C. at 177, 19 S.E.2d at 629 (citation omitted). Plaintiffs were required to rebut this presumption with evidence from which the jury could have reasonably found in favor of Plaintiffs on every element of negligent hiring. *Id*. The first issue is whether Defendant used due or reasonable care in hiring Ms. Clark, and in supervising her during her employment, with the presumption being that it did.

Defendant began providing in-home aide services in 2010, and began providing these services to Plaintiffs on 13 February 2012. The uncontested evidence shows that none of Defendant's clients had reported any thefts or violent crimes—nor any other crimes, and that none of Defendant's clients had complained about any serious issues involving Defendant's in-home aides.[5] Ms. Clark began working for Defendant in September of 2015, and began working in Plaintiffs' home in late 2015, after having worked with another of Defendant's clients. There is no evidence that Ms. Clark's work or character was found wanting by the client in Ms. Clark's first in-home care aide position working for Defendant. Plaintiffs' testimonies in the depositions and at trial demonstrated, repeatedly, that they only had positive things to say about Ms. Clark's work, care, personality, and character prior to 29 September 2016. Mr. Keith testified that, "[p]rior to September 29th [he] had never had any concerns or problems with Ms. Clark[.]" Mrs. Keith testified that "prior to the night of September 29th [2016 she] never had any concerns about Ms. Clark being an aide in [her] home," and "didn't have any uneasy feeling or suspicion about Ms. Clark being in [her] home during that time frame[.]" None of the members of the Keith family who testified expressed any concerns, suspicions, or red flags related to Ms. Clark's regular in-home work providing care for Plaintiffs. None of them testified to any suspicions that Ms. Clark was the person responsible for the missing coins, the missing money from Mrs. Keith's dresser, or missing cash from Mr. Keith's wallet—until after 29 September 2016. By all accounts, Ms. Clark was an able, quiet, polite, and professional employee and, other than Margret's testimony that she complained that the aides working in Plaintiffs' home were not performing some of the duties that Defendant's informational materials indicated were to be

5. Mr. Bailey testified that one prior client had reported money in her house had been taken, and Defendant removed the aide who the client suspected from the home. According to Mr. Bailey, the client later called back to inform Defendant that she had found the money she thought had been stolen, and requesting the return of the removed aide. The aide refused.

provided, there were no complaints lodged against Ms. Clark, nor any disciplinary action taken, while she worked for Defendant—until the events of 29 September 2016.

Plaintiffs never contacted Defendant with any negative reports concerning Ms. Clark, nor expressed any fears or suspicions that Ms. Clark might be stealing from them, or otherwise represented any kind of threat to them or anyone else. Both Mr. Keith and Mr. Bailey considered the other to be a "friend," and Mr. Bailey went to Plaintiffs' home at least every two weeks. Mr. Bailey was collecting payment from Plaintiffs on these bi-weekly visits, but he also checked in with Plaintiffs about how they were doing, if the aides were working out, and generally socialized to the degree that Mr. Keith thought of Mr. Bailey as a friend. Mr. Bailey also called Plaintiffs fairly regularly, to discuss any topics relevant to Defendant's provision of care for Plaintiffs, and to generally "check in." Mr. Bailey's testimony was uncontested that Defendant's aides were supervised by "the R.N.s [registered nurses] and . . . the HR director," and that the R.N.s would supervise the aides in the client's homes on a regular schedule. Ms. Bailey testified: "The nurse is the supervisor for the aides. Also, the nurse goes out to the home of each client because they do a ninety-day supervised revisit. They also do an evaluation of how things are going in the home. They talk with the aide that's there in the home." A "validation of skills" form completed by one of Defendant's supervising R.N.s, Wanda Patrick ("Ms. Patrick"), was entered into evidence. This form was one of the in-home evaluations of Ms. Clark conducted in July 2016. Ms. Patrick's evaluation of Ms. Clark did not include any "unsatisfactory" responses to Ms. Clark's performance as an in-home aide.

Frederick testified that Margret "had a unique role in the sense that when she would come to town she would have the opportunity to spend multiple days in the home." "She would actually stay at the home so she would see the whole process for twenty-four, forty-eight, seventy-two hours at a time, which my other sister and I would not have that opportunity because we didn't overnight at the home[.]" Margret testified: "Well, [Ms. Clark] came in at night some, but she was there on the weekends and she was there on some days, too." Although Margret had the most opportunity of Plaintiffs' children to observe Ms. Clark and the other aides at work, and to get to know them personally, in her testimony Margret expressed no concerns about Ms. Clark prior to 29 September 2016.

Evidence shows that Ms. Clark's three references were called, one could not be contacted, one assessed Ms. Clark as having an "excellent"

work ethic, stating she "is a very hard worker she does [and] completes the task at hand[,]" and indicated that she was punctual. He also assessed her "professionalism and attitude" as "excellent," and stated: "I would hire [Ms. Clark] to work for me. Very good worker." A second reference assessed Ms. Clark's work ethic, punctuality, professionalism, and attitude as "Good." After one of Defendant's nurse-employee's interviewed Ms. Clark for approximately two hours, Ms. Bailey interviewed Ms. Clark, and had only positive responses to Ms. Clark's performance and demeanor in the interview, referring to Ms. Clark as "very soft-spoken. She was very mild and easygoing." "She was pleasant[,]" and "[v]ery polite. She always answered with yes, ma'am and no, ma'am. Just easygoing." When asked if her interview with Ms. Clark raised any concerns about the fitness of Ms. Clark, Ms. Bailey stated: "No, I didn't have any concerns." Ms. Bailey testified Ms. Clark regularly came into Defendant's office, and was always "pleasant," and that Ms. Clark's nurse supervisor would accompany Ms. Clark to the home of the client(s) Defendant was servicing to evaluate Ms. Clark's performance and the clients' satisfaction every ninety days. Ms. Bailey stated that Ms. Clark never received an evaluation of "unsatisfactory" for any category on any of her evaluations. Ms. Bailey testified concerning Plaintiffs' regard for Ms. Clark's work: "I received calls of how awesome [Ms. Clark] was and how pleased [Plaintiffs] were with her work and how she was always prompt and pleasant and respectful so I—you know, I didn't have any concerns about her."

When Ms. Clark was hired in 2015, she had three misdemeanor convictions for non-violent crimes: 2008: Conviction for driving while license revoked; 2009: Conviction for possession of drug paraphernalia; and 2010: Conviction for criminal contempt. Plaintiffs also note that Ms. Clark was twice charged "for communicating threats"; however, these charges were dismissed because the complainant refused to cooperate with prosecutors. Ms. Clark had no felony convictions and was therefore hirable pursuant to Defendant's written standards for employment. Mr. Bailey testified that Ms. Clark checked the box on her application indicating that she had never been convicted of a crime, which was not true, but she also filled out a criminal background check authorization form, which permitted Defendant to run a background check at any time during her employment. Defendant testified that it conducted a thorough criminal background check on Ms. Clark, and knew about all convictions and charges listed above, but could only produce two criminal search documents, one undated that simply indicated that Ms. Clark had some criminal charge against her in 2007, and that it was "DISPOSED[,]" and a second that was requested after the events of 29 September 2016.

Ms. Bailey testified that criminal background checks were run for every employee, and it was her understanding that one had been run on Ms. Clark.

Defendant's "CRIMINAL BACKGROUND INVESTIGATION POLICY" states: "The applicant shall be allowed to work if no reported felony convictions exist, pending receipt of the Criminal History Record information." Defendant's policy allowed employment of certain applicants who had been convicted of felonies, depending on the crimes committed and a favorable interview with the applicant concerning the felony convictions. Because Ms. Clark had never been convicted of a felony, Defendant did not break any contractual obligation to Plaintiffs by hiring an employee with misdemeanor convictions.

Defendant's criminal background check authorization form included a space asking for Ms. Clark's "Drivers License Number," and she filled in the space with the number for her N.C. Identification Card, which is the same as the number for her expired driver's license. Ms. Clark gave Defendant her N.C. Identification Card—along with her Social Security Card—to photocopy for its records. Defendant stated in its answers to Plaintiffs' interrogatories: "Driving clients was not a part of [Ms.] Clark's job duties[,]" and Plaintiff produced no evidence that Ms. Clark's duties included driving Plaintiffs nor, if Ms. Clark in fact drove Mrs. Keith on errands, that Defendant was aware of this fact. Defendant testified through Mr. Bailey that it had no knowledge of Ms. Clark driving Plaintiffs. Mrs. Keith testified that she could not recall if Ms. Clark ever drove her anywhere.

Plaintiff also produced two letters from the Pitt County Child Support Agency requesting Ms. Clark's employment information because the agency was "required by law to investigate the possibilities of obtaining child support for child(ren) entitled to parental support. [The law] requires employers to provide certain . . . information so that child support may be collected or enforced." These letters were dated 25 May 2016 and 9 September 2016. Plaintiffs contend this was evidence that Ms. Clark was in dire financial straits. Mr. Bailey testified that many of Defendant's workers have child-support obligations, and it was not unusual to get letters like these, concerning their aides, from county child support agencies.

Plaintiffs argue on appeal that Defendant should have conducted a Facebook investigation of Ms. Clark, and contend that several of Ms. Clark's Facebook posts were evidence of her violent or criminal disposition. Initially, these posts were not originated by Ms. Clark, they were "memes" created by someone else that she "reposted" on her Facebook

page. More importantly, the trial court instructed the jury "that the Facebook posts may not be used by you in the determination of any fact in this case." We presume that the jury followed the trial court's instructions, and that the trial court did not consider these posts as substantive evidence when it denied Defendant's motion for a JNOV.

As Plaintiffs state in their brief: "[Defendant] assigned [Ms.] Clark to [Plaintiffs'] home shortly after it hired her in [late] 2015." Plaintiffs then contend, however: "Soon thereafter, things around the house started to go missing." Plaintiffs' evidence only allows speculation concerning whether Plaintiff was working for them when they noticed some of Mr. Keith's rolls of coins were missing, as Plaintiffs contend the coins were *noticed* to be missing in "the fall of 2015," there is no evidence suggesting the *actual theft* was conducted during that time period, and Ms. Clark only began working at Plaintiff's house at the end of the "fall 2015" time period. Further, even if Ms. Clark was working at Plaintiffs' home when the coins disappeared, the next "thing around the house" did not "go missing" until over a year later. Meaning Ms. Clark worked at Plaintiff's house for over a year with no evidence that anything was taken from Plaintiffs during that time period.

Plaintiffs' daughter Sarah testified that she was the person who noticed the missing coins: "I found some money missing myself." Sarah's memory of when she noticed coins missing was uncertain, stating that it was: "Last year, maybe the year before. It was recent – in my head it was recent." "Last year" would have been 2017, which was after the events of 29 September 2016 and the termination of Ms. Clark's employment. "The year before" would have been 2016.[6] However, Plaintiffs allege: "In the fall of 2015, [Plaintiffs] discovered that approximately $90.00 in rolled coins had been stolen from a box inside their home." Sarah testified that she immediately alerted Plaintiffs: "I immediately . . . took the box to my father and said, Daddy, someone has taken money from here. Someone has taken some rolls of quarters." Sarah stated that Mr. Keith "said, let's put it underneath the cabinet . . . so I'll know where it's at. And that was the last I saw of it." Mr. Keith testified: "My granddaughter found it missing to begin with and as I recall it was somewhere around – I think it was around $90.00 in the first group of coins that were taken in the rolls – coin wrappers."

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6. If Sarah meant her statement to mean "a year ago, maybe two years ago," then she would be placing the event approximately between late March of 2016 and late March of 2017, as her testimony occurred on 20 March 2018. While Ms. Clark was working for Plaintiffs in March of 2018—and until the events of 29 September 2016, less the several weeks she was removed in August 2016—these time periods and her recollection that the theft was "recent" differ significantly from the alleged time period of "the fall of 2015."

Mr. Bailey testified that he had not been contacted about any money missing from Plaintiffs' house until August of 2016, when he was informed by Mr. Keith that $90.00 had been removed from his wallet. Mr. Bailey also testified that Mrs. Keith came to him at that point and informed him of the $1,200.00 missing from her dresser drawer:

> [Mrs. Keith said] I'm missing some money as well. And I says, well, how much are you missing and when did you realize that you was missing money? And she says, well, I'm missing a little over $1,200.00 and me and Mr. Keith was both flabbergasted about that and says, you are missing how much? . . . . She told me it was in her drawer. And I says, in your bedroom? . . . . I asked her, could we go and look at that, inspect the drawers? And so we went to the bedroom together and inspected the drawers. . . . . I says, can you remember the last time it was here? She says, it was about two or three weeks ago is the last time I remember actually seeing it. And so I says, you're sure? She says, yes. I says, have you recognized any aides that was here at the time that the money was missing? Do you suspect anyone? . . . . She says, I don't know. And then she says, well, there was one particular day when I felt like somebody was near me, but I didn't know who that was. And I asked her if she could really try to think hard about that. And she said that she would, but she came back and said I just cannot remember. I don't know, you know, who that was or, you know, if that even happened.

This testimony is corroborated in large part by the testimonies of Plaintiffs' witnesses. Mr. Bailey testified that they talked more in the living room about the missing money:

> And so that's when Mr. Keith came out and said to me, Sylvester, I didn't really want to tell you this. . . . . And he says, well, about six or seven months ago, he says, I was missing some coins. . . . . And he says, I believe it was – had to be at least $500.00. And so I says, Mr. Keith, I says, you are missing coins about six or seven or eight months ago, I says, can you pinpoint exactly when that was? And he says, I know, I cannot pinpoint when or what happened there. And I says, why didn't you report this to me? I says, you know, we can't do anything about it if you don't report this to me. And he says, I did not want to get any of the aides in any trouble. I did not want to make this out of a big deal or anything like that. And I told him, but you

> have to report things like this. So everything in the same day was reported to [Defendant] Health-Pro, the very same day.

The jury was played the video deposition testimony of Defendant, through Mr. Bailey, and in it Defendant gave the same testimony concerning when it was first informed about the missing money. Plaintiffs' evidence either corroborates Mr. Bailey's testimony, or fails to contradict it. Plaintiffs acknowledge in their appellate brief that they "told [Defendant] Health-Pro about the missing money—from both 2015 and 2016—on the same day, in August 2016." None of Plaintiffs' witnesses could give more than extremely general and broad estimates concerning when the coins were discovered missing, and Mrs. Keith could only state that she believed she had last seen the $1,200.00 two to three weeks prior to discovering it was missing. It is not clear from the evidence when Mrs. Keith actually discovered the money was missing. Plaintiffs' complaint alleges the $1,200.00 "was stolen" in "July or August 2016[.]" Mrs. Keith testified that she believed she saw an aide just outside her room one day as she was removing some cash from her dresser drawer, but she did not know who it was, stating: "all I saw was an arm and at that time, as I said previously, we were having a changeover of personnel. Frankly, I don't remember who was on what nights." Mrs. Keith testified that Mr. Bailey "seemed very concerned that money went missing from [Plaintiffs'] home[.]"

The only evidence that created a relatively short time period for a possible theft was for the money missing from Mr. Keith's wallet, and that came from Mr. Bailey. According to Mr. Bailey's testimony, Mr. Keith told him he had last seen the money in his wallet on Thursday or Friday, and discovered it missing on Sunday when he was trying to pay for food he had ordered. Defendant wrote "Unknown 2016" in the "Incident Date:" section of its "Incident Report" concerning Plaintiffs' allegations of missing money. The report indicates that Defendant was informed of the missing money on 15 August 2016, which was a Monday. Therefore, if Mr. Bailey was correct about Mr. Keith's statements, and if Mr. Keith was correct in his recollection, the $90.00 would have to have been taken between Thursday, 11 August 2016 and sometime on Sunday, 14 August 2016. Plaintiffs testified they had no reason to suspect Ms. Clark had taken the money from the wallet or from the dresser drawer, and did not produce evidence establishing that Ms. Clark was working on any of these days.

Plaintiffs testified that they had no idea when any of the money was taken, who might have been working when it was taken, and did not

identify any of Defendant's aides as suspects. Mr. Bailey testified that Plaintiffs did not want the current aides replaced, but that they were going to cut down on the hours of care provided, so Defendant removed Ms. Clark and Ms. Little, apparently based on the fact that they had been working for Plaintiffs for a long time, the other two aides working for Plaintiffs were relatively new, so only Ms. Clark and Ms. Little would have been working for Plaintiffs "about six or seven or eight months" prior to 15 August 2016.

Plaintiffs also contend that Defendant's decision to return Ms. Clark to work at their house two to three weeks after she and Ms. Little had been removed from the house is evidence of Defendant's negligence. Mr. Keith testified that the decision to return Ms. Clark to work at Plaintiffs' home was made by Defendant, but he "never felt forced to have Ms. Clark [come] back into [the] home." Mr. Keith testified that he "didn't know that there was any need for" an investigation by Defendant before returning Ms. Clark to work at Plaintiffs' home. Mr. Keith testified concerning the time period that money was taken: "[Ms. Clark] was working there, yes. I don't know if she was in the house when it went missing or not." He was asked: "Is it fair to say that you don't know which aide, if any, took money from the home?" Mr. Keith's answer was: "No, I didn't." He further testified that he was satisfied with the manner in which Defendant handled the issue of the missing money. Plaintiffs both testified that they never had any concerns about Ms. Clark working in their home prior to the events of 29 September 2016, including the period after money disappeared in "July or August." The evidence concerning the missing money at most raised a *possibility* that Ms. Clark, as well as other people, could have had the opportunity to take it. It is not at all clear that she was working for Plaintiffs at the time of the alleged 2015 coins incident, which meant any of the four aides working at Plaintiffs' home in the July to August time period could be equally suspect, as could anyone else who may have spent time in Plaintiffs' home during that time period. The evidence available to Defendant prior to 29 September 2016 implicating Ms. Clark in the alleged disappearance of coins or cash was at best speculative.

This Court has stated that there is no general duty to conduct criminal background checks prior to hiring an employee. *Stanley*, 112 N.C. App. at 612, 436 S.E.2d at 274 ("Although [the employer] admits that it did not do a criminal record check on [the employee], we believe that it did not have a duty to do so. *See*, *e.g.*, *Evans v. Morsell*, 284 Md. 160, 395 A.2d 480 (1978) (stating that the majority of courts do not recognize a duty to inquire about an employee's criminal record)."). Therefore, our

analysis is limited to—considering the context and known facts—did Defendant have a duty to conduct an inquiry before hiring Ms. Clark and, if so, did Defendant exercise due care in conducting the inquiry. *Stanley*, 112 N.C. App. at 612–13, 436 S.E.2d at 274. Further, even if Defendant was "negligent" in its duty to properly vet Ms. Clark for a position that required her to work in clients' homes, no duty would attach to Defendant to protect the injured client unless Ms. Clark's injurious acts were of a kind reasonably foreseeable in light of her particular unfitness for the employment, and the facts demonstrating her unfitness would have been uncovered had Defendant conducted an investigation with reasonable care. This is because an employer's "negligence" in hiring an employee does not create a blanket "duty to protect" that covers all third parties, irrespective of the surrounding circumstances.[7] That is, Plaintiffs had to prove the necessary duty element of Plaintiff's negligent hiring claim by demonstrating with substantial evidence that *either* Defendant failed to use reasonable care before hiring Ms. Clark, and thereby failed to uncover reasonably knowable facts that made Ms. Clark unfit for that position, *or* Defendant hired Ms. Clark in spite of knowledge of Ms. Clark's unfitness. Further, it was Plaintiffs' duty to prove that, *as a result of the particular unfitness* of Ms. Clark that *Defendant* "*knew*," either in fact or constructively, Ms. Clark injured Plaintiffs, and the nature or type of that injury was, in the view of a reasonably prudent person in Defendant's position, *the probable result* of Defendant's lack of due care in hiring and supervising Ms. Clark, in light of *Defendant's knowledg*e of her *particular* unfitness.

In this case, Ms. Clark's criminal record included convictions for a few misdemeanors that involved neither theft nor violence. Ms. Clark's application was satisfactory, including two good references. The fact that she checked the box indicating no convictions, even taken as intentionally deceptive, does not seem particularly noteworthy in the context of this case—particularly since Ms. Clark filled out the criminal record check form with her correct information, including social security number and N.C. Identification Card number. Owing child support is not disqualifying, in fact, retaining Ms. Clark in employment, better enabling her to meet her obligations, is acting in accordance with good public

7. "We refuse to make employers insurers to the public at large by imposing a legal duty on employers for victims of their independent contractors' ["Smith's"] intentional torts that bear no relationship to the employment. We note that . . . the result would be the same if Smith had been an employee of defendants[.] Smith could have perpetrated the exact same crimes against these plaintiffs, in the exact same manner, and with identical chances of success, on a day that he was not selling Omega's meats and driving Omega's vehicle." *Little*, 171 N.C. App. at 588–89, 615 S.E.2d at 49.

policy. Further, there does not appear to be any record evidence that Child Social Services ever actually needed to garnish Ms. Clark's wages. The Facebook posts were not evidence the jury could consider to decide any material fact, including Defendant's duty of care—and we find no significant relevance in these posts. Importantly, prior to 29 September 2016 Ms. Clark had worked for Defendant for over a year, had by all accounts done a fine job, was known as quiet and polite—Ms. Clark had established herself as a dependable employee that her clients appeared to like. This record of actual employment with Defendant serves as a substantial counterweight to the relatively minor potential "red flag" evidence Plaintiffs presented at trial.

In light of the events of 29 September 2016, it is easy to assume Ms. Clark did take money from Plaintiffs. However, we are limited to what was or reasonably should have been known to Defendant prior to that date. There was nothing solid from which Defendant would have been able to fairly accuse Ms. Clark of theft. Plaintiffs' testimony shows they did not have any reason to suspect Ms. Clark other than Defendant's attempt to narrow the number of aides that could have been working at Plaintiffs' home during the coin incident alleged to have happened in the fall of 2015 and the events in July or August of 2016. Plaintiffs testify that they assumed Defendant had cleared Ms. Clark prior to returning her to their house. Defendant states that it did clear her, as much as it reasonably could on the evidence it could procure. Plaintiffs did not feel threatened by Ms. Clark's presence, and everybody who testified concerning their reactions to the news that Ms. Clark had been involved in the 29 September 2016 crime testified that they were completely surprised.

We hold, on these facts, that a reasonably prudent person in Defendant's position, knowing *all* the facts that Plaintiffs introduced about Ms. Clark at trial, available to Defendant prior to 29 September 2016, would not have recognized the "possibility of the intentional" criminal acts of Ms. Clark—that the "risk of foreseeable harm" to Plaintiffs was of the kind that occurred on 29 September 2016, and the risk of [this kind of] harm was so "slight," "that a reasonable [person] in the position of [Defendant] would disregard it." Restatement (Second) of Torts § 302B(d.). Therefore, Defendant had no duty to protect Plaintiffs from Ms. Clark's criminal acts of 29 September 2016.

For the same reasons outlined above, we also agree with Defendant that there was insufficient evidence to take to the jury on the issue of proximate cause because the crime of 29 September 2016 was not a reasonably foreseeable result of any presumed negligence on the part of Defendant. Further, there are specific elements a plaintiff must prove to prevail in a negligent hiring case:

> (1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) *either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision*,' . . . and (4) that the injury complained of resulted from the incompetency proved.

Stanley, 112 N.C. App. at 611, 436 S.E.2d at 273 (underlining added) (citation omitted). Based on the facts of this case, Defendant could only

> be held liable [for Plaintiffs'] assault[ ] by . . . [Ms. Clark if Defendant] "knew, or in the exercise of reasonable care in the selection . . . of [Ms. Clark] should have known, [Ms. Clark was] likely, by reason of past conduct, bad temper or otherwise, to commit [the] assault, even though the particular assault was not committed within the scope of [Ms. Clark's] employment."

Id. (citation omitted). Plaintiffs' evidence was insufficient to demonstrate proximate cause; that, based upon Ms. Clark's past conduct, the events of 29 September 2016, or some similarly serious and violent crime, were likely to occur.

III. Conclusion

We hold that Plaintiffs' complaint did not include a claim against Defendant based upon the doctrine of *respondeat superior*, and the facts could not support such a claim. We further hold that Plaintiffs' claim was one pursuant to the doctrine of negligent hiring, retention, or supervision, not, as argued by Plaintiffs, one in ordinary negligence. Therefore, the trial court should have granted Defendant's motion for a directed verdict, failing that, should have granted Defendant's request that the jury be instructed in accordance with negligent hiring and, finally, should have granted Defendant's motion for a JNOV on Plaintiffs' claim for ordinary negligence, because it was not the proper action to prosecute on these facts. Assuming, *arguendo*, Plaintiffs' claim pursuant to ordinary negligence was proper, we hold that Defendant's motion for a JNOV should have been granted based upon insufficient evidence of Defendant's duty to protect Plaintiffs from Ms. Clark's criminal acts and, as the crime was not reasonably foreseeable, Plaintiffs failed to produce sufficient evidence of proximate cause as well. We further hold that there was insufficient evidence of the elements of duty and

proximate cause pursuant to a claim for negligent hiring, supervision, or retention, and Defendant's motion for a JNOV should have been granted for that claim as well. As a result, judgment notwithstanding the verdict should have been granted in favor of Defendant on Plaintiffs' negligence claim, under any theory, and we reverse the judgment of the trial court and remand for entry of such an order. Finally, Plaintiffs' cross-appeal was conditioned on this Court remanding for a new trial. Because we have directed the trial court to enter judgment in favor of Defendant, Plaintiffs' cross-appeal concerning the issue of punitive damages is moot and, therefore, dismissed.

REVERSED AND REMANDED; CROSS-APPEAL DISMISSED.

Judge ZACHARY concurs.

Judge DILLON dissents with separate opinion.

DILLON, Judge, dissenting.

The majority concludes that the verdicts/judgments in favor of Plaintiffs must be reversed and that Defendant was entitled to judgment as a matter of law. I disagree.

It was *not* reversible error for the trial court to allow the case to be presented as one in "ordinary negligence," where Defendant argues that the case should have been characterized more specifically as one in "negligent retention." Though Plaintiffs allege that Defendant was negligent in retaining Ms. Clark, evidence of negligent retention is merely a means by which a plaintiff proves ordinary negligence. As such, negligent retention (like any other ordinary negligence claim) requires a plaintiff to show that the defendant owed a duty, that the defendant breached that duty, and that the plaintiff suffered an injury proximately caused by the breach.

And the evidence, *when viewed in the light most favorable to Plaintiffs*, was sufficient to make out an ordinary negligence claim based on their evidence of Defendant's negligent retention of a dishonest employee. The crux of the majority's analysis is based on its conclusion that Plaintiffs were *required* to show that the robbery occurred while the dishonest employee was on duty. I do not believe this to be a hard and fast rule. Rather, I conclude that an employer may still be held liable for negligent retention when its dishonest employee uses "intel" learned while on duty to facilitate a theft, though waits until off-duty to

commit the theft. Here, it should not matter here that Defendant's dishonest employee did not rob Plaintiffs while on duty, but rather waited to be off-duty to use her knowledge gained based on her employment of the location of a key to Plaintiffs' home hidden outside, the location of Plaintiffs' valuables within the home, and the times when the vulnerable Plaintiffs would be alone to facilitate the commission of the robbery.

Accordingly, my vote is "no error." The jury's verdict should be sustained.

Discussion

The facts of the case are relatively straight-forward.

Plaintiffs Mr. and Mrs. Keith are an elderly couple living in their own home. In 2012, they contracted with Defendant Health-Pro to employ qualified people to provide care to them in their home.

In 2015, Deitra Clark was employed by Defendant to serve as a caregiver and was assigned to Plaintiffs' home. She performed her caregiving services well. However, shortly after she was assigned to Plaintiffs' home, money belonging to Mr. Keith went missing. Months later, on two other occasions, while she remained assigned to Plaintiffs' home, more of Plaintiffs' money went missing. After working for about a year, Ms. Clark used her knowledge of Plaintiffs and their home to facilitate a break-in of the home and subsequent robbery.

Plaintiffs commenced this action against Defendant seeking damages suffered from the break-in/robbery, alleging that Defendant was negligent in continuing to assign Ms. Clark to their home and that this negligence was a proximate cause of their damages.

I. Ordinary Negligence vs. Negligent Retention

The majority concludes that it was error to allow Plaintiffs to characterize their claim as an ordinary/common law negligence claim, rather than as a negligent retention claim. *See Adams v. Mills*, 312 N.C. 181, 187, 322 S.E.2d 164, 169 (1984) (describing the tort as "ordinary common law negligence").) I disagree.

To make out a claim for ordinary negligence, "a plaintiff must [show]: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006).

Our Supreme Court has long characterized a claim alleging negligent retention as an ordinary negligence claim. For instance, nearly a

century ago, our Supreme Court held that a claim based on evidence of negligent retention of an incompetent employee "was sufficient to [reach] the jury as to [the] right of plaintiff to recover at common law for negligence." *Johnson v. R.R.*, 191 N.C. 75, 80, 131 S.E. 390, 393 (1926). The Court characterized "[t]he action brought by [the] plaintiff [in that case] was a common-law action for negligence[,]" *id.* at 79, 131 S.E. at 392, recognizing that the employer had a duty "to see that those admitted to and retained in his service are fitted for the duties imposed upon them, the measure of responsibility being the exercise of ordinary or reasonable care." *Id.* at 80, 131 S.E. at 393.

More recently, our Supreme Court again characterized a claim for negligent retention as a "common law negligence" claim. *See Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 335-36, 678 S.E.2d 351, 353 (2009).

Common law negligence differs from other distinct forms of negligence by the proof that may be required. For example, gross negligence requires additional proof of an "intentional wrongdoing or deliberate misconduct[,]" by the defendant. *Ray v. N.C. DOT*, 366 N.C. 1, 13, 727 S.E.2d 675, 684 (2012). But as a type of ordinary negligence, a plaintiff alleging negligent retention must merely show that the defendant owed plaintiff a duty, that the defendant breached this duty, and that this breach was a proximate cause of some injury suffered by the plaintiff. And as explained in the next section, I conclude that Plaintiffs met their evidentiary burden.

II. Sufficiency of Plaintiffs' Evidence for Actionable Negligence

The majority concludes that Plaintiffs failed to offer sufficient evidence on either ordinary negligence or negligent hiring. I disagree. As stated above, negligent hiring is merely a theory by which a plaintiff proves ordinary negligence.

A. Duty

Defendant clearly owed Plaintiffs, an elderly couple in poor health, a **duty** to exercise reasonable care in providing caregivers who were *not only* competent in providing for their physical needs, *but also* who were honest and not likely to take advantage of their position of trust to steal from Plaintiffs. Defendant knew that its caregivers would have wide access to its clients' homes and that its clients were vulnerable to being taken advantage of by dishonest caregivers.

The majority relies, in large part, on its conclusion that Defendant owed no legal duty to Plaintiffs for any harm Ms. Clark caused them

when she was not on the clock. The majority relies on *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 615 S.E.2d 45 (2005), to support this conclusion. I conclude that the majority misreads *Little* as *requiring* that the employee to be on-duty as an essential element of every negligent retention claim.

In *Little*, an employer hired a dishonest person to deliver meat from a truck to the employer's clients. The dishonest employee drove into a neighborhood, parked the truck in a customer's driveway; but then proceeded to break into the house of a neighbor *who was not a customer or prospect of the employe*r. *Id*. at 584, 615 S.E.2d at 47. We held that even assuming the employer knew its employee was dishonest, the employer could not be held liable for the break-in of the neighbor's home. We reasoned that the employer owed no duty *to the neighbor* because its employment relationship with its dishonest employee had nothing to do with the break-in. *Id*. at 589, 615 S.E.2d at 49. Specifically, we so held based on the facts of that case because:

> (1) the employee "was not in a place where he had a legal right to be [when] he broke [into the] plaintiffs' home";
>
> (2) the employee "and plaintiffs did not meet as a direct result of [the employee's] relationship with defendants" and "did not enter plaintiffs' home as a salesman";
>
> (3) the defendant-employers "received no benefit, direct, indirect or potential, from the tragic 'meeting' between [the employee] and plaintiffs."

Id. at 588, 615 S.E.2d at 49.

The present case is distinguishable from *Little*. Here, the harm to Plaintiffs (the break-in) had everything to do with Ms. Clark's employment relationship with Defendant, though it happened when she was off-duty. Plaintiffs and Ms. Clark *met* as a direct result of her employment with Defendant. And though Ms. Clark was off-duty and had no right to be in Plaintiffs' home when the break-in occurred, Ms. Clark used "intel" she learned while she was *on the clock* to target Plaintiffs and to facilitate the break-in. (This "intel" is explained more fully in subsection C. below concerning the "proximate cause" element). And Defendant otherwise received a benefit – being paid large sums of money by Plaintiffs – from Ms. Clark working in Plaintiffs' home, when she gained the "intel."

The majority's rigid interpretation of *Little*, that the harm in every negligent retention case *must* occur when the employee is "in a place

where he had the right to be," would lead to illogical results. For example, based on the majority's logic, Defendant would have been subject to liability *only if* Ms. Clark had let her accomplices in and showed them where valuables were hidden *while on duty*. But, Defendant escapes liability simply because Ms. Clark and her accomplices waited for her to be off duty to use her intel to gain entry and to locate Plaintiffs' valuables. Or consider the following example:

> Assume a restaurant retained a parking valet it knew was a car thief, and assume the valet stole the car of a patron. Based on the majority's reasoning, the restaurant would be subject to liability for negligent retention *only if* the valet stole the car while on duty. The restaurant, would not be liable, though, if the valet merely made a copy of the patron's car key while on duty, as the patron dined, and then waited until he was off-duty to use that key to steal the car.

Little would be applicable if Ms. Clark and her accomplices had broken into the house of the Plaintiffs' next-door neighbor, to whom Defendant owed no duty and about whom Ms. Clark would not have gained intel simply based on her employment. In the same way, if the valet in my example did not make a key but had hot-wired the patron's car when off duty, perhaps the restaurant would not be liable, as there would be no connection between the valet's employment and the theft.

B. Breach

Defendant had a duty to Plaintiffs to exercise reasonable care to see that its caregivers were not the type who would likely to take advantage of their access to the lives and homes of Defendant's clients. There was sufficient evidence, when viewed in the light most favorable to Plaintiffs, that Defendant **breached this duty** it owed to Plaintiffs by allowing Ms. Clark to continue working in Plaintiffs' home: There was evidence which suggested that Defendant should have known that Ms. Clark was dishonest *and* capable of the robbery, perhaps not in September 2015 when she was initially hired by Defendant, but certainly a year later by mid-September 2016, weeks before the break-in. By that time, Defendant knew that Ms. Clark had lied on her job application about her criminal past; that she was having on-going money troubles; that money had gone missing in Plaintiffs' homes on three separate occasions, all after Ms. Clark was assigned there; and that Ms. Clark was one of only two caregivers likely to have been the culprit. Specifically, it could be inferred from the evidence, viewed in the light most favorable to Plaintiffs, that:

In 2012, Defendant contracted with Plaintiffs to provide caregivers.

Three years later, in September 2015, Ms. Clark was hired by Defendant as a caregiver and was assigned to Plaintiffs' home. Up to that time, nothing had been reported stolen by Plaintiffs. Defendant learned at some point before the break-in that Ms. Clark had lied on her job application about having no criminal history.

In October 2015, only a month after Ms. Clark began working in the Plaintiffs' home, several hundred dollars in rolled coins belonging to Plaintiffs' went missing, though Defendant was not immediately notified.

In May 2016, Defendant learned that Ms. Clark was having money problems: Defendant, as Ms. Clark's employer, was notified by Pitt County that Ms. Clark was in arrears in child support payments.

Three months later, in August 2016, Plaintiffs met with Ms. Clark's supervisor and first reported the October 2015 theft. Plaintiffs also reported that $90.00 had *recently* been taken from Plaintiff, Mr. Keith's wallet and $1,200.00 had *recently* been taken from Plaintiff, Mrs. Keith's dresser. Ms. Clark's supervisor concluded that if a caregiver had stolen the money, it was likely either Ms. Clark or one other certain caregiver. Each, though, when questioned, denied stealing from Plaintiffs.

After learning of the three thefts, Defendant removed Ms. Clark from Plaintiffs' home. But weeks later, Defendant again placed Ms. Clark in Plaintiffs' home, signaling to them that Defendant had used reasonable diligence to determine that Ms. Clark was not the thief.

By letter dated 9 September 2016, shortly after Ms. Clark was re-assigned to Plaintiffs' home, Defendant was again notified that Ms. Clark was again delinquent on paying child support. Defendant, though, continued assigning Ms. Clark to work in Plaintiffs' home without raising any concern to Plaintiffs.

Three weeks later, Ms. Clark participated in the break-in of Plaintiffs' home, in which well over $1,000.00 was stolen from Plaintiffs.

There are cases suggesting that an employer breaches its duty to exercise reasonable care to provide honest caregivers by failing to conduct a criminal background check or by knowledge of minor crimes in the remote past. However, the issue here is not Ms. Clark's criminal record itself, but rather that Defendant knew Ms. Clark *had lied* on her job application about it. This lie put Defendant on notice that Ms. Clark was not an honest person. And while knowledge of the lie, by itself, might not have constituted a breach, it along with Defendant's knowledge of the three thefts and that Ms. Clark, a woman who had lied on her job application and who was having money troubles, was one of two suspects were enough to reach the jury on this issue. Reasonable minds can differ as to whether continuing to place Ms. Clark in Plaintiffs' home with all this knowledge was sufficient to constitute a breach. The jury made its call.

C. Proximate Cause

The evidence was sufficient for the jury to infer that Defendant's breach of duty was a **proximate cause** of the break-in. Plaintiff's evidence showed that Ms. Clark used information learned *while on the job* to target Plaintiff's home and facilitate the break in/robbery:

> That Plaintiffs were advanced in age and not in good health and, therefore, easy targets for a robbery.
>
> The location of a key to Plaintiffs' home hidden outside in an obscure location, allowing the perpetrators to gain entry quietly, without any warning or causing any neighborhood disturbance.
>
> The location of Mr. Keith's gun, allowing the perpetrators to grab the gun before Plaintiffs could get to it to defend themselves.
>
> That no one would be with Plaintiffs after 11:00 p.m., after the last caregiver left for the day.
>
> The location of hundreds of dollars in rolled coins belonging to Mr. Keith hidden in an obscure location within the home, allowing the perpetrators to steal quickly.
>
> That Mr. Keith had a car, could still drive, and had a bank card from which he could access money from his account, allowing the perpetrators, who did not have a car during the robbery to force Mr. Keith to drive one of them to his bank and withdraw $1,000.00.

There may have been other proximate causes. But as our Supreme Court has instructed, "[w]hen two or more proximate causes join and concur in producing a result complained of, the author of each cause may be held for the injuries inflicted." *Hairston v. Alexander*, 310 N.C. 227, 234, 311 S.E.2d 559, 566 (1984).

Defendant argues that there was no proximate cause since it was not "foreseeable" that Ms. Clark would participate in an aggressive robbery. Indeed, our Supreme Court has held that "[f]oreseeability is [ ] a requisite of proximate cause." *Id.* at 233, 311 S.E.2d at 565.

But our Supreme Court also instructs that (1) "the test of foreseeability [ ] does not require that defendant should have been able to foresee the injury *in the precise form* in which it actually occurred" and (2) "the law of proximate cause does not always support the generalization that the misconduct of others is unforeseeable. The intervention of wrongful conduct of others may be the very risk that defendant's conduct creates." *Id.* at 233-34, 311 S.E.2d at 565 (emphasis added). And whether a defendant's negligence was a "proximate cause of an injury is ordinarily a question for the jury." *Short v. Chapman*, 261 N.C. 674, 680, 136 S.E.2d 40, 45 (1964).

There was enough evidence here from which the jury could infer that it was foreseeable that: (1) a dishonest caregiver might take advantage of the access and information she would gain due to the nature of the job; (2) Ms. Clark, if she was the culprit of the earlier thefts, might steal again, given that she was having money troubles; and (3) Ms. Clark might wait to be off duty to steal again, which would require a break-in, since she was recently under suspicion for the earlier thefts.[1]

III. Jury Instructions

I disagree with the majority's contention that the trial court committed reversible error by giving certain jury instructions.

Defendant argues in its brief that the trial court erred in instructing the jury on the "duty" element.

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1. Defendant cites *Williamson v. Liptzin*, 141 N.C. App. 1, 539 S.E.2d 313 (2000), to support its contention that Plaintiffs' injuries were not foreseeable. However, the facts in *Williamson*, where we concluded that there was no proximate cause as a matter of law, are easily distinguishable. In *Williamson*, the plaintiff, who had killed two people during a psychotic episode, sued a psychiatrist who had treated him *several months earlier* at a time when his psychosis was under control due to medication. We held that the shooting was unforeseeable because it was too remote in time from the defendant's treatment and there was no evidence that a professional could have predicted the plaintiff's violent acts.

The trial court gave North Carolina Pattern Jury Instruction 102.11, which describes "duty" generally, as follows: "Every person is under a duty to use ordinary care to protect himself and others from injury. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself or others from injury." N.C.P.I. Civil 102.11.

Defendant argues in its brief that the trial court should have given the following, more detailed instruction on "duty," which it requested and which closely tracks language in *Little*:

> The plaintiff must prove that the defendant owed plaintiff a legal duty of care. This means that the plaintiff must prove that [the employee] and the plaintiff were in places where each had a right to be when the wrongful act occurred, that the plaintiff encountered [the employee] as a direct result of his employment by the defendant, and that the defendant must reasonably have expected to receive some benefit, even if only potential or indirect, from the encounter between (the employee) and the plaintiff.

Defendant contends that the jury should have been instructed that "[w]hether the relevant individuals were in places where they had a right to be . . . is relevant to this matter" as this matter is a negligent retention case.

The trial court's actual instruction was a correct statement of the law in this case, as Plaintiffs claim was one in ordinary negligence. But it would not have necessarily been inappropriate for the trial court to expound on some of the elements, provided the requested instructions were a correct statement of the law as supported by the evidence. I disagree, though, that the instruction on duty requested by Defendant, though maybe appropriate in certain negligent retention cases, would have been appropriate in this case. No one disputes that the "wrongful act" occurred when Ms. Clark had no right to be in Plaintiffs' home. However, as explained above, it was enough for Plaintiffs to show that Ms. Clark used intel learned while she was on the job to facilitate the robbery which occurred after she had left work for the day. Accordingly, the instructions requested by Defendant would have confused the jury. If followed by the jury, the instructions would have necessarily resulted in a verdict for Defendant. In fact, if the instructions were an accurate statement of the law, as applied to the evidence in this case, then Defendant would have been entitled to judgment as a matter of law. Based on the requested instructions, Defendant owed no duty to

Plaintiffs *solely* because the robbery occurred when Ms. Clark was off the clock, and therefore could not be held liable, notwithstanding that Defendant had been negligent in continuing to place Ms. Clark in Plaintiffs' home, that Ms. Clark provided the intel learned while placed in Plaintiffs' home to the perpetrators to facilitate the break-in, that it was foreseeable that Ms. Clark would try and steal from Plaintiffs again, and that the break-in would not have otherwise occurred.

Also, I conclude that Defendant failed to meet its burden to show that the jury was "likely misled" by the instructions which were actually given. *Coppick v. Hobbs*, 240 N.C. App. 324, 334, 772 S.E.2d 1, 9 (2015). It is unlikely that the jury did not understand the case before it — that it did not find for Plaintiffs based on anything other than its determination that Defendant owed Plaintiffs a duty to provide honest caregivers, that Defendant breached this duty by continuing to place Ms. Clark in Plaintiffs' home, despite their knowledge about her, and that it was the information that Ms. Clark learned through her employment about Plaintiffs that caused Plaintiffs to be targeted and facilitation of the break-in.

Reasonable minds can differ regarding Defendant's liability for the criminal conduct of its employee Ms. Clark towards its client. But the jury has spoken in this case, and my vote is to honor their verdict.

JERRY MACE, SR. & MACE GRADING CO., INC., PLAINTIFFS
v.
SCOTT T. UTLEY, II, JODY BELL, ENERGY PARTNERS, LLC & ENERGY PARTNERS OF NC, LLC, UTLEY ENTERPRISES, LLC D/B/A ENERGY PARTNERS OF MEBANE, DEFENDANTS

No. COA19-726

Filed 15 December 2020

1. Discovery—depositions—refusal to appear—defective notice —no sanctions

The trial court did not abuse its discretion in denying plaintiffs' motion to compel defendants to appear for depositions, where plaintiffs gave defective notice of the depositions under Civil Procedure Rule 30 by requiring defendants to be deposed in a different county from the one where they resided. Consequently, it was unnecessary for defendants to file a motion for a protective order to avoid

sanctions under Rule 37 because their refusal to appear for depositions did not warrant sanctions.

2. Corporations—summary judgment—genuine issue of material fact—alleged promise to convey ownership interest in company

In a dispute involving two business owners and their companies, where plaintiff alleged that defendant fraudulently induced him to invest in defendant's businesses (also named defendants in the action) by promising him an ownership interest in one of those businesses, which he never received, the trial court's order granting summary judgment in favor of defendants was reversed because a genuine issue of material fact existed regarding whether plaintiff took out a $300,000 loan to pay off an unrelated, preexisting debt or to buy the ownership interest that defendant allegedly promised him.

Judge BRYANT concurring in part and dissenting in part.

Appeal by plaintiffs from orders entered 22 March 2019 by Judge Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 3 March 2020.

K.E. Krispen Culbertson for plaintiffs-appellants.

Steffan & Associates, P.C., by Kim K. Steffan, for defendants-appellees.

MURPHY, Judge.

When Plaintiffs fail to comply with discovery rules, we affirm the trial court's order denying the motion to compel depositions. Where there are genuine issues of material fact, we hold the trial court errs in entering summary judgment in favor of Defendants and dismissing Plaintiffs' action.

BACKGROUND

In 2005, Defendant Scott T. Utley, II ("Utley"), a member/manager of Defendant Energy Partners, LLC ("Energy Partners"),[1] paid $150,000.00 for a 25% ownership interest in Energy Partners. To finance the 25% interest, Utley borrowed $150,000.00 from BB&T and secured the loan by executing deeds of trust on real property.

1. Energy Partners, LLC, a South Carolina corporation, was registered to do business in North Carolina under the trade name "Energy Partners of N.C., LLC," a named Defendant in this action.

In April 2007, Utley executed an agreement to purchase all of the assets of Energy Partners.[2] Pursuant to the asset purchase agreement, Utley assumed a lease agreement between Energy Partners and Foust Oil Company, Inc. ("Foust Oil"). Utley assigned that lease agreement to Utley Investments, LLC ("Utley Investments"). Utley Investments arranged financing with BB&T for the purchase of Energy Partners' assets. The financing was secured by a $300,000.00 deed of trust on real property purchased from Foust Oil, located on Highway 70 in Mebane ("Mebane property").

A few months later, Defendant Jody Bell ("Bell")[3] met with Plaintiff Jerry Mace, Sr. ("Mace"), the owner of Plaintiff Mace Grading Co., Inc. ("Mace Grading"). Mace owned 8.81 acres of land located in Caswell County which he sold to Utley Investments to use as a site for propane storage. Mace subsequently borrowed $300,000.00 from MidCarolina Bank, with his personal residence as collateral.

Meanwhile, Utley Investments filed an *Assumed Name Certificate* in the Orange County Register of Deeds to do business under the trade name "Energy Partners of Mebane." Utley Investments d/b/a Energy Partners of Mebane borrowed $100,000.00 on 23 April 2008 and $200,000.00 on 2 June 2008 from BB&T to fund cleanup costs for the Mebane property—used by Foust Oil for its distribution bulk plant—after Foust Oil failed to remove contaminated soil from the property. Mace granted Utley permission to use one of his properties as collateral for the loans. In turn, Utley agreed to pay all the property taxes and insurance.[4] Mace provided start-up materials, such as a storage tank, asphalt millings, concrete saddles, and vehicles. Utley was allowed to purchase fuel on credit from Gateco Fuels, using Mace's account. Utley allowed Mace to receive fuel at no charge to offset the balance of the loan.

Energy Partners of Mebane subsequently contracted with Mace Grading to remove the contaminated soil from the Mebane property. Mace provided trucks and drivers to remove the contaminated soil. After the work was completed, Mace Grading invoiced Energy Partners of Mebane. Energy Partners of Mebane sued Foust Oil to recoup the cleanup costs for the soil. The matter was settled out of court, but

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2. After Energy Partners sold its assets, it stopped filing annual reports with the Secretary of State, and the corporation was administratively dissolved in September 2010.

3. Bell is Utley's mother, who assisted Utley with administrative matters in his business.

4. Utley made payments until 2017 when the lawsuit commenced.

none of the settlement money was applied to the balance of Mace Grading's invoice.

Plaintiffs Mace, in his individual capacity, and Mace Grading filed a complaint seeking to pierce the corporate veil for punitive damages and alleging claims for breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices against Defendants. Defendants subsequently moved for summary judgment on Plaintiffs' claims and Plaintiffs filed a motion to compel Utley and Bell to appear for depositions. The trial court granted Defendants' summary judgment motion and denied Plaintiffs' motion to compel. Plaintiffs timely appealed.

ANALYSIS

A. Plaintiffs' Motion to Compel

[1] Plaintiffs argue the trial court abused its discretion in denying their motion to compel the depositions of Utley and Bell on the basis of its finding that Plaintiffs failed to comply with discovery rules. We disagree.

When we "review[] a trial court's ruling on a discovery issue, [we] review[] the order of the trial court for an abuse of discretion." *Midkiff v. Compton*, 204 N.C. App. 21, 24, 693 S.E.2d 172, 175 (2010). An abuse of discretion occurs "where the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Both parties were on notice that all discovery must be completed by 28 February 2019. The timeline of events during discovery reveal on 14 January 2019 Plaintiffs contacted Defendants to discuss taking depositions for Utley and Bell. In response, Defendants indicated a desire to depose Mace. Counsel for both parties agreed to depose Utley, Bell, and Mace on the same day and exchanged proposed dates for scheduling the depositions.

On 15 January 2019, Defendants' counsel emailed two proposed dates in February to conduct the depositions. Seven days later, Plaintiffs' counsel responded suggesting a new date. Defendants' counsel inquired again about the two February dates and Plaintiffs' counsel did not respond for another two weeks. By that time, the two February dates were no longer available. On 4 February 2019, Plaintiffs' counsel inquired about dates for the last week of February. Defendants' counsel responded the following day proposing two alternate dates. Plaintiffs' counsel did not respond to that email until 12 February 2019, and again, the proposed dates were unavailable. When Plaintiffs'

counsel asked about March dates, Defendants' counsel declined to accommodate the request because it was after the discovery deadline.

On 14 February 2019, Plaintiffs' counsel served a written notice of deposition for Utley and Bell, to be held on 28 February 2019. However, Defendants' counsel informed Plaintiffs' counsel Utley and Bell would not attend the depositions and Plaintiffs filed a motion to compel, which was subsequently denied.

Rule 30 of the North Carolina Rules of Civil Procedure states:

> A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. . . . The notice shall be served on all parties at least 15 days prior to the taking of the deposition when any party required to be served resides without the State and shall be served on all parties at least 10 days prior to the taking of the deposition when all of the parties required to be served reside within the State. Depositions of parties, officers, directors or managing agents of parties or of other persons designated pursuant to subsection (b)(6) hereof to testify on behalf of a party may be taken only at the following places:
>
> *A resident of the State may be required to attend for examination by deposition only in the county wherein he resides or is employed or transacts his business in person. . . .*

N.C.G.S. § 1A-1, Rule 30(b)(1) (2019) (emphasis added). While Plaintiffs contend it was improper for Utley and Bell to refuse to appear for depositions, we note the notice of deposition was defective under Rule 30 as it required Utley and Bell to attend a deposition in Guilford County, even though they were residents of Orange County.

Plaintiffs contend Defendants should have filed a motion for protective order and state the reasons for not appearing for depositions. We reject that contention. Rule 37 of the North Carolina Rules of Civil Procedure allows for sanctions of a party who fails to appear for a deposition, *after receiving proper notice*, unless the party has filed for a

protective order. *See* N.C.G.S. § 1A-1, Rule 37(d)(i) (2019) ("If a party . . . fails [] to appear before the person who is to take the deposition, after being served with a proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just[.] . . . The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order[.]").

Here, as stated above, Plaintiffs failed to properly notify Defendants of the depositions, a predicate to the imposition of sanctions. As a result, Defendants' failure to appear neither warranted the issuance of sanctions nor the filing of a motion for protective order. Accordingly, we hold the trial court did not abuse its discretion in denying Plaintiffs' motion to compel, as it correctly determined Plaintiffs failed to comply with discovery rules.

B. Defendants' Motion for Summary Judgment

[2] We review a trial court's order granting or denying summary judgment de novo. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). A genuine issue of material fact is one in which

> the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. . . . [A] genuine issue is one which can be maintained by substantial evidence.

Smith v. Smith, 65 N.C. App. 139, 142, 308 S.E.2d 504, 506 (1983) (quoting *Zimmerman v. Hogg & Allen, P.A.*, 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974)).

> For summary judgment, the movant is held to a strict standard in all cases and all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion. Reasonable persons can reach different conclusions on the evidentiary material offered. Summary judgment is inappropriate where reasonable minds might easily differ as to the import of the evidence.

Marcus Bros. Textiles, Inc. v. Price Waterhouse, L.L.P., 350 N.C. 214, 221-22, 513 S.E.2d 320, 325-26 (1999) (internal citations omitted). "Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue." *Id.* All of the facts asserted by Mace in his affidavit must be taken as true and inferences therefrom must be viewed in the light most favorable to the Plaintiffs. *See Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted) (noting when reviewing summary judgment, "[a]ll facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party").

Here, Plaintiffs' allegations against Defendants stem from the contention that Mace was misled by Utley to invest in Utley's businesses because he was promised an ownership interest but never received it. At the summary judgment hearing, Mace submitted an affidavit in which he alleged he entered into a verbal agreement with Utley and Bell to buy a 25% interest in Utley Investments for $300,000.00. To finance this ownership interest, Mace alleged he took out an equity line of credit on his personal residence in the amount of $300,000.00 on 11 September 2007. Mace alleged he subsequently delivered a check for $300,000.00 to Utley.

Conversely, Defendants provided two documents, the *Satisfaction of Security Instrument* and the *Deed of Trust*, in support of their motion for summary judgment. The *Deed of Trust* shows Mace and his wife obtained an equity line of credit on their personal residence in the amount of $235,000.00 through Suntrust Bank in November of 2006. The *Satisfaction of Security Instrument* shows Mace and his wife paid off the $235,000.00 owed to Suntrust Bank on 20 September 2007. Defendants argue Mace obtained the $300,000.00 loan for the purpose of satisfying his existing debt with Suntrust Bank as opposed to buying an ownership interest in Utley Investments since Mace paid off his preexisting debt to Suntrust Bank nine days after receiving the $300,000.00 loan.

Defendants' argument is only one possible interpretation. *See Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 524, 723 S.E.2d 744, 748 (2012) (noting when the use of a term in a contract can have more than one possible meaning depending on the resolution of certain disputed facts, there is a genuine issue of material fact and summary judgment is not justified). As the nonmoving party, Mace's alleged facts must be taken as true and viewed in the light most favorable to him. Mace alleges he delivered the check for the ownership interest in Utley Investments directly to Utley. While there is no evidence of this check in the Record, there is also no documentation in

the Record linking the $300,000.00 loan to the *Satisfaction of Security Instrument*. Whether Mace took out the $300,000.00 loan in order to pay off his preexisting debt or to acquire an ownership interest in Utley Investments is the classic he-said-she-said where credibility must be determined by twelve jurors and not one (or two) judges. This issue is a genuine issue of material fact that must be left to the jury to determine and Plaintiffs are entitled to move forward beyond the summary judgment stage.

CONCLUSION

Plaintiffs failed to comply with discovery rules and we therefore affirm the trial court's order denying the motion to compel depositions. As there exist genuine issues of material fact, we reverse the trial court's order granting summary judgment in favor of Defendants and dismissing Plaintiffs' action.

AFFIRMED IN PART, REVERSED IN PART.

Judge STROUD concurs.

Judge BRYANT concurs in part, dissents in part, with separate opinion.

BRYANT, Judge, concurring in part and dissenting in part.

I concur in the portion of the majority opinion that properly concludes plaintiffs failed to comply with discovery rules, which, in turn, affirmed the trial court's order to deny the motion to compel. However, I respectfully dissent from the portion of the majority opinion reversing the trial court's ruling on summary judgment as plaintiffs' forecast of evidence was *not* sufficient to create a genuine issue of material fact.

The trial court, upon considering all the evidence provided by the parties, found there was no genuine issue of material fact and determined defendants were entitled to judgment as a matter of law. In my view, the majority's opinion reversing the trial court is directly contrary to the evidentiary framework used to analyze claims subject to summary judgment.

Rule 56 of the North Carolina Rules of Civil Procedure provides that any party is entitled to judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact[.]" N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). When considering a motion for summary judgment, "[a]ll facts asserted by the [nonmoving] party are taken as true, and their inferences must be viewed in the light most favorable to that party." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012).

> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim . . . . *If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.*

Hart v. Brienza, 246 N.C. App. 426, 430, 784 S.E.2d 211, 215 (2016) (citation omitted) (emphasis added). "The purpose of the summary judgment rule is to provide an expeditious method of determining whether a genuine issue as to any material fact actually exists and, if not, whether the moving party is entitled to judgment as a matter of law." *Gudger v. Transitional Furniture, Inc.*, 30 N.C. App. 387, 389, 226 S.E.2d 835, 837 (1976). "Unsupported allegations in the pleadings are insufficient to create a genuine issue as to a material fact where the moving adverse party supports his motion by competent evidentiary matter showing the facts to be contrary to that alleged in the pleadings." *Id.*

In the instant case, it is undisputed that plaintiffs and defendants had prior business dealings which led to the commencement of this action. On the record, the parties do not dispute the following facts: that Mace conveyed an 8-acre parcel in Caswell County to Utley Investments by general warranty deed, that Utley Investments was allowed to use one of Mace's properties as collateral for a loan with BB&T, that Utley was granted access to use Mace's account to purchase fuel on credit, and that Mace Grading performed soil removal for Utley on the Mebane property.

All of plaintiffs' allegations against defendants stem from the contention that Mace was misled by Utley to invest in Utley's businesses because he was promised an ownership interest but never received it.

At the summary judgment hearing, plaintiffs submitted an affidavit by Mace, which stated that he entered into a verbal agreement with Bell and Utley to buy a twenty-five percent interest in Utley Investments in

exchange for $300,000. According to Mace, he used his property as collateral to obtain a loan on 11 September 2007 from MidCarolina Bank and delivered a check for $300,000 to Utley. Plaintiffs presented documentation reflecting that Mace obtained a home equity loan not to exceed $300,000. However, there was no documentation—as the majority acknowledges—to show the existence of a check or a delivery of those proceeds to defendants as Mace averred in his affidavit to support his claim of ownership.

Defendants, on the other hand, in support of their motion for summary judgment, provided evidence that in 2006, prior to Mace receiving the $300,000 loan from MidCarolina Bank, Mace had an existing debt with SunTrust Bank in the amount of $235,000. Defendants' exhibit showed that Mace paid off the Suntrust loan on 20 September 2007, nine days after receiving the funds from MidCarolina Bank. As such, contrary to plaintiffs' allegations, defendants demonstrated that Mace had taken out the $300,000 loan for purposes of satisfying his existing debt with Suntrust as opposed to buying an ownership interest in Utley's businesses.[1] On this record, there is no support for the majority's assertion that this "is the classic he-said-she-said" where defendants have presented factual evidence to rebut the allegations in the complaint. *See Variety*, 365 N.C. at 523, 723 S.E.2d at 747 ("The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense." (citation omitted)).

Plaintiffs could not establish ownership or offer of ownership in any business entity owned or operated by Utley to maintain their claims, and therefore, the appropriate action by the trial court was, as it did, to grant summary judgment.[2] *See Gudger*, 30 N.C. App. at 389, 226 S.E.2d at 837 ("[Allegations, s]tanding alone, [] are insufficient to overcome the competent evidence offered by the movant showing the facts to be contrary to those alleged."). Additionally, Mace claims that he was defrauded by defendants to use his property to secure a loan from BB&T. However,

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1. Notably, plaintiffs filed a similar action in 2017 against defendants—excluding Utley Enterprises—where Mace submitted a sworn statement in response to defendants' request for admissions. Plaintiffs had voluntarily dismissed the action before the summary judgment hearing and refiled the current action a year later.

2. Mace signed a statement acknowledging no ownership interest in Utley entities—admitting that "neither Mace Grading Co., Inc. nor Carl Jerry Mace, Sr., individually, has any ownership interest of business entity owned or operated by Scott Utley, including without limitation the business operated at [the Mebane property] as Energy Partners of Mebane, Utley Investments LLC or any business interest of Scott Utley owned and operated under any other trade name, corporate entity, limited liability company or otherwise."

Mace was not personally obligated on the note, but his property was used to secure the loan. Nevertheless, Mace still owns the property he pledged. Mace admitted in his affidavit that defendants submitted payments to cover the taxes and insurance on the property; this served to further undermine his claims of fraud against defendants.

Consequently, I would affirm the trial court's decision to grant summary judgment in favor of defendants because plaintiffs failed to demonstrate that the evidence, even when viewed in the light most favorable to plaintiffs, was sufficient to create a genuine issue of material fact.

Accordingly, I respectfully concur in part and dissent in part.

JOSEPH A. MALDJIAN AND MARIANA MALDJIAN, PLAINTIFFS
v.
CHARLES R. BLOOMQUIST AND CAROLINE BLOOMQUIST,
DEFENDANTS-APPELLANTS/THIRD-PARTY PLAINTIFFS
v.
PATTI D. DOBBINS, KATHY SMITH, AND ALLEN TATE CO., INC.,
THIRD-PARTY DEFENDANTS

No. COA19-975

Filed 15 December 2020

1. Deeds—reformation claim—appellate standard of review—directed verdict and judgment notwithstanding the verdict—denied

In an appeal from defendants' denied motions for directed verdict and judgment notwithstanding the verdict on plaintiffs' claim to reform a deed to real property, the Court of Appeals held that the correct standard of review was whether "more than a scintilla of evidence" supported each element of plaintiffs' claim and therefore justified submitting the case to the jury. The applicable standard of proof at trial for reformation claims—whether plaintiffs produced "clear, cogent, and convincing evidence" of each element—does not become the standard of review on appeal.

2. Deeds—reformation claim—mutual mistake—draftsman's error—statute of frauds—latent ambiguity

In an action to reform a deed conveying a sixty-two-acre property, plaintiffs presented sufficient evidence that the deed resulted from a mutual mistake and did not correctly reflect the parties'

intent, which was for plaintiffs to sell defendants twenty-two acres of the property. The evidence included testimony from the closing attorney explaining that the parties negotiated for the sale and purchase of twenty-two acres but that she erroneously inserted a description of the entire sixty-two-acre tract when drafting the deed. Further, the parties' agreement to the sale of twenty-two acres did not violate the applicable statute of frauds where the written contract referenced a recorded survey describing the twenty-two acres and was, therefore, only latently ambiguous.

3. Attorneys—legal malpractice—preparation of a deed—deed reformation lawsuit—party's contributory negligence

In plaintiffs' action to reform a deed, where the closing attorney (third-party defendant) stipulated that she negligently drafted a deed conveying a sixty-two-acre tract to defendants even though the parties negotiated for the sale of only twenty-two acres, the trial court properly denied defendants' motions for directed verdict and judgment notwithstanding the verdict as to their legal malpractice claim against the attorney, in which defendants alleged the attorney's negligence forced them to incur substantial legal expenses in defending plaintiffs' lawsuit. There was more than a scintilla of evidence from which a jury could find that any damage to defendants was at least partially caused by defendants' contributory negligence or intentional wrongdoing (by claiming ownership of land they knew they had not purchased).

4. Negligence—third-party defendant—realtor—sale and purchase of land—deed reformation lawsuit

In an action to reform a deed, where the evidence showed that defendants agreed to purchase twenty-two out of sixty-two acres of land from plaintiffs, but the closing attorney inadvertently drafted the deed to convey the entire sixty-two-acre tract, the trial court properly denied defendants' motion for judgment notwithstanding the verdict with respect to its negligence claim against plaintiffs' realtor (third-party defendant). The realtor did not stipulate to negligence at trial, and there was no evidence that the realtor's involvement in the parties' transaction proximately caused any damage to defendants.

5. Evidence—Rule 403 analysis—attorney's offer to cover costs through liability insurance—deed reformation lawsuit

In an action to reform a deed, where the parties negotiated for the sale and purchase of twenty-two out of sixty-two acres of land, but the closing attorney (third-party defendant) inadvertently

drafted the deed to convey the entire sixty-two-acre tract, the trial court did not abuse its discretion by excluding evidence of the attorney's offer to pay plaintiffs' legal costs through her liability insurance carrier. Even if the evidence were relevant for a collateral purpose under Evidence Rule 411 (to show bias), any probative value was substantially outweighed by the danger of unfair prejudice or confusion under Rule 403 where it was unclear whether the attorney's offer was to fund plaintiffs' litigation (which she never did) or to cover the cost of correcting the deed (which she offered to both plaintiffs and defendants).

6. Evidence—Rule 403 analysis—tolling agreement between plaintiffs and third-party defendant—deed reformation lawsuit

In an action to reform a deed, where the parties negotiated for the sale and purchase of twenty-two out of sixty-two acres of land, but the closing attorney (third-party defendant) inadvertently drafted the deed to convey the entire sixty-two-acre tract, the trial court did not abuse its discretion by excluding evidence of the attorney's agreement with plaintiffs tolling the statute of limitations on any claims plaintiffs might have against her. Any probative value of the evidence in showing the attorney's bias was substantially outweighed by the danger of unfair prejudice or confusion, where the attorney offered to enter into a similar tolling agreement with defendants and where her credibility was already attacked throughout trial because of her admitted malpractice in drafting the deed.

7. Appeal and Error—preservation of issues—exclusion of evidence—granted motion in limine—deed reformation lawsuit

In an action to reform a deed, where the parties negotiated for the sale and purchase of twenty-two out of sixty-two acres of land, but the closing attorney (third-party defendant) inadvertently drafted the deed to convey the entire sixty-two-acre tract, defendants failed to preserve for appellate review their challenge to the exclusion of evidence regarding the attorney's alleged violations of the Rules of Professional Conduct because, after the trial court granted the attorney's motion in limine, defendants did not subsequently attempt to introduce the evidence or submit an offer of proof at trial.

8. Evidence—cumulative error—exclusion of evidence—challenged on appeal—deed reformation lawsuit

In a deed reformation action, where defendants challenged the trial court's exclusion of myriad evidence concerning the attorney (third-party defendant) who mistakenly drafted the deed, but where

the Court of Appeals rejected each challenge on appeal, there was no cumulative, prejudicial error in the trial court's exclusion of the evidence taken as a whole.

Appeal by defendants from judgment entered 6 November 2018 and order entered 14 March 2019 by Judge Tanya T. Wallace in Davie County Superior Court. Heard in the Court of Appeals 29 April 2020.

Fitzgerald Litigation, by Andrew L. Fitzgerald, and The Bomar Law Firm, PLLC, by J. Chad Bomar, for plaintiffs-appellees.

Blanco Tackabery & Matamoros, P.A., by Peter J. Juran and Chad A. Archer, and Nelson Mullins Riley & Scarborough, LLP, by Stuart H. Russell and Lorin J. Lapidus, for defendants-appellants/third-party plaintiffs-appellants.

Poyner Spruill LLP, by John Michael (J.M.) Durnovich and Karen H. Chapman, for third-party defendants-appellees Kathy Smith and Allen Tate Co., Inc.

Cranfill Sumner & Hartzog LLP, by Richard T. Boyette, for third-party defendant-appellee Patti D. Dobbins.

ZACHARY, Judge.

On their third appeal to this Court, the parties continue their protracted litigation concerning, *inter alia*, reformation of a deed conveying over 62 acres of real property in Mocksville, North Carolina. The background and procedural facts of this case are provided, in part, in the parties' two related appeals: *Maldjian v. Bloomquist*, 245 N.C. App. 222, 782 S.E.2d 80 (2016), and *Maldjian v. Bloomquist*, 245 N.C. App. 328, 782 S.E.2d 121, 2016 WL 409797 (2016) (unpublished).

On 19 March 2018, this matter came on for trial by jury in Davie County Superior Court. After an eight-day trial, the jury found that Plaintiffs Joseph A. Maldjian and Mariana Maldjian executed a deed for 62.816 acres, more or less, to Defendants Charles R. Bloomquist and Caroline Bloomquist under a mutual mistake of fact. In addition, the jury found against the Bloomquists on the counterclaims they lodged against the Maldjians, as well as the Bloomquists' claims against third-party Defendants Patti D. Dobbins, Kathy Smith, and Allen Tate Co., Inc. ("Allen Tate Co."). The trial court drew the description for a deed of correction, conveying 22.015 acres, more or less, to the Bloomquists, and

ordered the Bloomquists to execute the correction deed within 10 days of entry of judgment.

The Bloomquists contend on appeal that the trial court erred (1) by denying certain of the Bloomquists' motions for directed verdict and judgment notwithstanding the verdict; and (2) by excluding certain evidence following pretrial motions *in limine*. After careful review, we affirm.

Background

The Maldjians owned 62.816 acres on Cana Road in Mocksville, North Carolina ("the Cana Road property"). They were contacted by the Bloomquists' realtor, Kathy Smith of Allen Tate Co., regarding the sale of a portion of the Cana Road property. Because the Bloomquists lived in Pennsylvania, the Maldjians dealt primarily with Kathy Smith and the Bloomquists' daughter and son-in-law, Kate and Sidney Hawes. Mrs. Maldjian testified that she met with the Haweses and discussed "different configurations" of the property for sale, shading various acreages on the Davie County Geographic Information System map. Kathy Smith and LeAnne Brugh, the Maldjians' realtor, were also present. After negotiating a price and agreeing to have the 22 acres surveyed, the parties entered into a contract, which Smith prepared at the Bloomquists' direction. The Maldjians hired a surveyor who prepared a survey of the 22 acres, which was shared with the Bloomquists and Smith, and recorded prior to closing. The Bloomquists retained Patti D. Dobbins to serve as the closing attorney and to prepare the deed. She later agreed to represent the Maldjians as well. On 20 May 2013, the Maldjians executed a deed, recorded at Deed Book 551, Page 69, Davie County Registry, conveying the entire Cana Road property to the Bloomquists. The Bloomquists then leased the Cana Road property to the Haweses.

Approximately ten months after the closing on the Cana Road property deal, the Maldjians filed suit against the Bloomquists and the Haweses, seeking, *inter alia*, reformation of the deed conveying all of the Cana Road property to the Bloomquists.

The Maldjians contended that the deed was incorrect, the result of mutual mistake and a draftsman's error, and did not correctly reflect the intention of the parties. According to the evidence propounded by the Maldjians at trial, the parties negotiated for the sale and purchase of 22 acres. In support of their contention, the Maldjians offered, among other evidence, the parties' correspondence, the survey, and the testimony of various witnesses. Smith, the Bloomquists' realtor, testified that the parties negotiated the sale of 22 acres to the Bloomquists. The

closing attorney, Dobbins, testified that the Bloomquists agreed to purchase 22 acres, but that she inadvertently failed to draw a new description from the survey of the 22 acres, and instead inserted the description of the entire 62-acre tract into the deed, which the Maldjians signed and Dobbins recorded. Furthermore, the local Carolina Farm Credit agent testified that Dr. Bloomquist complained to him that he was overcharged on his property tax bill because it included 41 acres that he did not purchase—he only purchased 22 acres, and thus did not owe property taxes on the entire 62-acre tract. Dobbins, the closing attorney, also testified that she and Dr. Bloomquist had several conversations about the incorrect description in the deed, which she offered to correct at no charge. Mrs. Maldjian testified that she and her husband were not alerted to the problem with the deed until neighbors complained to them nine to ten months later that the Haweses were limiting their access to a portion of the property that the Maldjians did not think that they had sold. This report prompted the Maldjians to review the deed on the website for the Davie County Register of Deeds, at which time they discovered the error. The Maldjians maintained that they then attempted to work with the Bloomquists to resolve this error.

The Bloomquists maintained at trial that they intended to purchase the entire 62-acre Cana Road property from the Maldjians, and that they interpreted the contract's reference to a 22-acre survey to mean that the Maldjians would provide them with a survey of 22 acres for their future use. They did not think that it referred to the number of acres that they were purchasing. Dr. Bloomquist testified that the contract also stated "Lot/Unit 62," which the Bloomquists believed was the number of acres that they were purchasing. According to the Bloomquists, the parties had a meeting of the minds, and the deed conveying the entire Cana Road property to them accurately reflected the intention of the parties.

Procedural Posture

On 11 March 2014, the Maldjians filed a verified complaint against the Bloomquists and the Haweses in Davie County Superior Court, seeking, *inter alia*, reformation of the deed. On 1 May 2014, the Maldjians filed their amended verified complaint, and on 10 July 2014, the Maldjians filed their second amended verified complaint.

On 22 July 2014, the Bloomquists and the Haweses filed their answer generally denying the Maldjians' claims, asserting various defenses, and moving to dismiss the complaint. The Bloomquists further asserted several counterclaims relating to the condition of the house against the Maldjians: (1) breach of the implied covenant of good faith and fair

dealing; (2) negligent misrepresentation; (3) fraud; (4) unfair and deceptive trade practices; and (5) breach of contract. On 21 August 2014, the Maldjians responded to the Bloomquists' counterclaims, generally denying the Bloomquists' allegations and asserting various defenses.

On 22 April 2016, the Bloomquists moved to add Dobbins, Smith, and Allen Tate Co. as third-party defendants. After the trial court granted the motion, the Bloomquists filed their third-party complaint, alleging (1) legal malpractice on the part of Dobbins, (2) negligence on the part of Smith and Allen Tate Co., and (3) breach of contract on the part of Smith and Allen Tate Co.

Dobbins filed an answer and crossclaim on 6 July 2016 against Smith and Allen Tate Co., seeking joint tortfeasor contribution if her alleged negligence was determined to be a proximate cause of any damages sustained by the Bloomquists. In response, Smith and Allen Tate Co. filed their answer and crossclaim, in which they moved to dismiss the third-party complaint, generally denied the allegations therein, and crossclaimed against Dobbins for indemnity.

On 17 March 2017, both the Bloomquists and the Haweses moved for summary judgment. On 3 April 2017, the trial court granted the Haweses' motion for summary judgment as defendants, but denied the motion with regard to the Bloomquists.

On 19 March 2018, the case came on for jury trial in Davie County Superior Court, the Honorable Tanya T. Wallace presiding. The jury heard evidence on (1) the Maldjians' claim for reformation of the deed; (2) the Maldjians' claim for unjust enrichment; (3) the Bloomquists' counterclaim for breach of contract, with regard to the condition of the house; (4) the Bloomquists' third-party claim for legal malpractice against Dobbins; and (5) the Bloomquists' third-party claims for negligence and breach of contract against Smith and Allen Tate Co.

The Bloomquists moved for directed verdict on the Maldjians' claim for unjust enrichment, which the trial court granted. The trial court denied all other motions for directed verdict, including the Bloomquists' motion for directed verdict on the Maldjians' claim for reformation of the deed. At the close of all evidence, the Bloomquists again moved for directed verdict on the remaining claims, which the trial court denied.

After a short deliberation, the jury found, *inter alia*, that: (1) the Maldjians executed the deed under a mutual mistake of fact; (2) the Maldjians did not breach their contract with the Bloomquists; (3) the Bloomquists were damaged by the negligence of Dobbins, but

that the Bloomquists contributed to their damages by their own negligence or intentional wrongdoing; and (4) the Bloomquists were not damaged by the negligence of Smith and Allen Tate Co. On 6 November 2018, the trial court entered judgment in accordance with the jury's verdicts. The trial court further ordered that the Bloomquists execute the trial court's deed of correction within 10 days of entry of judgment, conveying 22.015 acres, more or less, to the Bloomquists, and with the description drawn in accordance with the survey.

The Bloomquists filed a motion for judgment notwithstanding the verdict, which the trial court denied. The Bloomquists gave timely notice of appeal to this Court.

Discussion

On appeal, the Bloomquists assert numerous arguments that can be segmented into two broad categories: that the trial court erred (1) by denying several of the Bloomquists' motions for directed verdict and their motion for judgment notwithstanding the verdict; and (2) by excluding certain evidence following pretrial motions *in limine*.

I. Motions for Directed Verdict and JNOV

A. Reformation Claim

The Bloomquists first contend that the trial court erred by denying their motion for judgment notwithstanding the verdict ("JNOV") as to the Maldjians' claim for reformation of the deed.

1. Standard of Review

[1] As a general matter, "[w]hen considering the denial of a directed verdict or JNOV, the standard of review is the same." *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013). That is, this Court must determine "whether the evidence, taken in the light most favorable to the non-moving party, [wa]s sufficient as a matter of law to be submitted to the jury." *Id.* (citation omitted). The trial court must deny a JNOV motion "if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case." *Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God*, 136 N.C. App. 493, 499, 524 S.E.2d 591, 595 (2000). "A scintilla of evidence is defined as very slight evidence. The party moving for judgment notwithstanding the verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law." *S. Shores Realty Servs., Inc. v. Miller*, 251 N.C. App. 571, 578, 796 S.E.2d 340, 347-48 (citations and internal quotation marks omitted), *disc. review denied*, 369 N.C. 563, 798 S.E.2d 753 (2017). On appeal,

whether the movant was entitled to JNOV is a question of law, which this Court reviews de novo. *Green*, 367 N.C. at 141, 749 S.E.2d at 267.

The Bloomquists propound, however, that "the evidentiary standard . . . is greater" upon appellate review of a reformation claim. They assert that "this Court is charged to review the underlying judgment—and the JNOV order—to determine whether the Maldjians produced *clear, strong, and convincing* evidence from which the jury could have reasonably found all essential elements of the Maldjians' reformation claim in their favor," rather than whether the Maldjians produced *more than a scintilla of evidence* to support their claim. (Emphasis added). Indeed, it is easy to conflate the appellate standard of review with the clear and convincing standard of proof applied at trial.

The determination as to "[w]hether the evidence is clear, cogent and convincing is *for the jury*," not the appellate court. *Durham v. Creech*, 32 N.C. App. 55, 59, 231 S.E.2d 163, 166 (1977) (emphasis added). As our Supreme Court stated over a century ago,

> although the evidence must be "clear, cogent and convincing" to entitle a party to correct or reform a written instrument, the [trial] court had no right to withhold the case from the jury. If there was more than a scintilla of evidence, we cannot hold, as a matter of law, that the evidence is not "clear, cogent and convincing," that being for the jury.

Cuthbertson v. Morgan, 149 N.C. 72, 76, 62 S.E. 744, 746 (1908).

More recently, then-Judge Beasley made clear in *Willis v. Willis*, 216 N.C. App. 1, 3-4, 714 S.E.2d 857, 859 (2011), *modified and aff'd*, 365 N.C. 454, 722 S.E.2d 505 (2012), that at trial of a deed reformation claim, the plaintiff must establish by clear and convincing evidence that the terms of the written document do not represent the original understanding of the parties. However, the trial court should deny a motion for directed verdict "if more than a scintilla of evidence supports each element of the non-moving party's claim." *Willis*, 216 N.C. App. at 3, 714 S.E.2d at 859 (citation omitted). The standard of review on appeal is "whether the evidence, considered in the light most favorable to the non-moving party, [wa]s sufficient to be submitted to the jury"—i.e., whether there was more than a scintilla of evidence to support each element of the nonmovant's claim. *Id.* (citation omitted).

In sum, the "clear, cogent, and convincing" standard of proof applies at the trial level, and is for the jury to determine. On appeal of the denial

of a motion for directed verdict or JNOV, this Court reviews whether there was "more than a scintilla of evidence" to support each element of the reformation claim, therefore justifying submission of the case to the jury.

2. Mutual Mistake

[2] The Bloomquists first argue that the trial court erred in denying their motion for JNOV because the Maldjians failed to produce clear, cogent, and convincing evidence that they "executed the Original Deed while mistakenly believing that it would transfer only the twenty-two acres identified by the Reformation Survey," and that the Bloomquists shared the same mistaken belief. (Emphasis omitted). We disagree.

"A written instrument, though it may describe one property, may be reformed to reflect the true intent of the parties where a movant can show (1) the existence of a mutual mistake of fact, and (2) a resultant failure of the document as executed to reflect the parties' intent." *Bank of Am., N.A. v. Schmitt*, 263 N.C. App. 19, 24, 823 S.E.2d 396, 399 (2018) (citation and internal quotation marks omitted), *disc. review denied*, 372 N.C. 96, 824 S.E.2d 424 (2019). "A mutual mistake is one that is shared by both parties to the contract, wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement." *Wells Fargo Bank, N.A. v. Coleman*, 239 N.C. App. 239, 248-49, 768 S.E.2d 604, 611 (citation and internal quotation marks omitted), *disc. review denied*, 368 N.C. 280, 775 S.E.2d 871 (2015).

"In an action for reformation of a written instrument, the plaintif[f] has the burden of showing that the terms of the instrument do not represent the original understanding of the parties[.]" *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 651, 273 S.E.2d 268, 270 (1981).

Accordingly, on appeal, this Court must determine whether the Maldjians produced more than a scintilla of evidence that there was a mutual mistake of fact as to the acreage that the Maldjians would convey to the Bloomquists; that is, whether it was the intent of all parties that the Maldjians convey to the Bloomquists approximately 22 acres of the Cana Road property as described in the survey, rather than the entire Cana Road property. *See id.* at 651, 273 S.E.2d at 270-71.

We are satisfied that the Maldjians produced sufficient evidence that the deed did not reflect the actual agreement and intent of the Maldjians and the Bloomquists because of mutual mistake, the true intent being that the deed convey the 22 acres described in the survey

to the Bloomquists. First, there were several witnesses at trial—including Dobbins, the Bloomquists' realtor, and Mrs. Maldjian—who testified that the agreement was for the Bloomquists to purchase 22 acres from the Maldjians.

In addition, the Maldjians produced evidence at trial that Dr. Bloomquist told others that the deed incorrectly conveyed 62 acres to him, rather than 22 acres as intended. The Carolina Farm Credit loan officer, Mark Robertson, testified that Dr. Bloomquist repeatedly called him after he received the property tax bill, stating that the bill was wrong because he had been deeded too much land in the conveyance. Dr. Bloomquist discussed the mistake with Dobbins several times.

There was also substantial evidence of the negotiations for the sale of the property, which indicated that the parties' agreement was for a sale of 22 acres as described in the survey. The emails exchanged between the parties reflect a 22-acre deal. The Bloomquists' realtor, Smith, prepared the Offer to Purchase Contract and included the provision "22 ACRES TO BE SURVEYED," and the Maldjians paid to have the survey done. Smith testified that she emailed the completed survey of the 22 acres to Mrs. Bloomquist four days prior to closing, and Mrs. Bloomquist admitted reviewing the email with the attached survey.

Moreover, "[e]vidence which tends to show the draftsman's error *also tends to show that the parties were mistaken in their beliefs*. The evidence would support a finding of mutual mistake by the parties." *Durham*, 32 N.C. App. at 60, 231 S.E.2d at 167 (emphasis added). Here, there was clear evidence at trial that the failure to provide a description in the deed for the 22 acres shown in the survey, as intended by the parties, resulted from a mistake of the individual who drafted the deed, Dobbins. Dobbins testified that after Dr. Bloomquist alerted her staff to the error in the deed, Dobbins determined that her employee failed to conduct a "follow-up title check just before closing to make sure nothing ha[d] happened between when you first check and the closing," and thus, the employee did not discover the recorded survey of the 22.015 acres. Dobbins testified that because of this error, she failed to prepare a deed that reflected the true intention of the parties and mistakenly prepared a deed conveying the entire Cana Road property to the Bloomquists.

The Bloomquists' argument that the parties cannot have agreed to the conveyance of the 22 acres that was surveyed because it "cut[s] off acreage required for access to the property that was supposed to be included" is inapposite. Considering the evidence in the light most

favorable to the nonmovants, the Maldjians, the electric-gate mechanism is not needed for access to the property. In addition, the "gate equipment" can be relocated, or replaced for approximately $2,000.

Finally, the Bloomquists insist that "any argument that the parties agreed upon the . . . [s]urvey violates the statute of frauds," because the survey was not attached to the contract or signed by both parties. We reject this argument.

"A contract to convey an interest in land must satisfy the requirements of the statute of frauds. The contract must be in writing and signed by the party to be charged." *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 123, 388 S.E.2d 538, 551 (1990). A contract for the conveyance of land "violates the statute of frauds as a matter of law if it is patently ambiguous, that is, if it leaves the subject of the contract, the land, in a state of absolute uncertainty and refers to nothing extrinsic by which the land might be identified with certainty." *Wolfe v. Villines*, 169 N.C. App. 483, 486, 610 S.E.2d 754, 757 (2005) (citation and internal quotation marks omitted). However, there is no violation of the statute of frauds if the description is latently ambiguous, that is, if the description "is insufficient, by itself, to identify the land, but refers to something external by which identification might be made." *Id.* at 486, 610 S.E.2d at 758 (citation omitted).

A contract to convey land from a larger described tract is saved from patent ambiguity by the parties' agreement to determine the description from a survey to be obtained by the sellers. As our Supreme Court has stated, "[i]t is not a ground for objection that the survey was prepared subsequently to the execution of the option . . . . [The parties] recognized the necessity for one and obviously contemplated that it would be made sometime in the future." *Kidd v. Early*, 289 N.C. 343, 356, 222 S.E.2d 392, 402 (1976); *see also Wolfe*, 169 N.C. App. at 486-87, 610 S.E.2d at 757-58 (concluding that where the parties agreed that the description would be determined by a survey yet to be obtained, the description was not patently ambiguous, and did not violate the statute of frauds).

Here, "the contract provided an extrinsic means for identification of the precise property to be sold," *Wolfe*, 169 N.C. App. at 487, 610 S.E.2d at 758, namely, the survey requested by the Bloomquists in the contract they submitted to the Maldjians. Thus, "we find the description was latently, rather than patently, ambiguous and therefore did not violate the statute of frauds as a matter of law." *Id.*

In conclusion, there was ample evidence adduced at trial "of a mutual mistake by the parties and their draftsman. The record reflects

nothing which bars reformation as a matter of law." *Durham*, 32 N.C. App. at 61, 231 S.E.2d at 167. Accordingly, the trial court did not err in denying the Bloomquists' motion for JNOV on the Maldjians' reformation claim.

B. Negligence Claims Against the Third-Party Defendants

We next consider whether the trial court erred by denying the Bloomquists' motions for directed verdict and JNOV as to their legal malpractice claim against Dobbins, as well as their motion for JNOV as to their negligence claim against Smith and Allen Tate Co.

1. Standard of Review

"In determining the sufficiency of the evidence to justify the submission of an issue of contributory negligence to the jury, the court must consider the evidence in the light most favorable to the defendant and disregard that which is favorable to the plaintiff." *Kummer v. Lowry*, 165 N.C. App. 261, 263, 598 S.E.2d 223, 225, *disc. review denied*, 359 N.C. 189, 605 S.E.2d 153 (2004); *see also Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 479, 562 S.E.2d 887, 896 (2002) ("The existence of contributory negligence is ordinarily a question for the jury . . . ."). To that end, "[i]f there is more than a scintilla of evidence that [the] plaintiff is contributorily negligent, the issue is a matter for the jury, not for the trial court." *Cobo v. Raba*, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998).

"A directed verdict is seldom appropriate in a negligence case." *Alva v. Cloninger*, 51 N.C. App. 602, 609, 277 S.E.2d 535, 540 (1981). As a matter of policy, "[g]reater judicial caution is . . . called for in actions alleging negligence as a basis for [the] plaintiff's recovery or, in the alternative, asserting contributory negligence as a bar to that recovery." *Taylor v. Walker*, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987).

2. Legal Malpractice Claim

[3] The Bloomquists contend that Dobbins stipulated that she was negligent, and that as a result of Dobbins' negligence, the Bloomquists were forced to incur legal fees defending the lawsuit instituted by the Maldjians. They further argue that the trial court erred in denying their motions for directed verdict and JNOV because Dobbins "failed to present even a scintilla of evidence as to the Bloomquists' purported contributory negligence or alleged intentional wrongdoing," and that instead, "the entirety of the evidence suggested that the Bloomquists always believed . . . that they got exactly what they were supposed to receive" in the deal. We disagree.

It is well settled that "[c]ontributory negligence is a defense to a claim of professional negligence by attorneys, just as it is to any other negligence action." *Piraino Bros., LLC v. Atl. Fin. Grp., Inc.*, 211 N.C. App. 343, 351, 712 S.E.2d 328, 334, *disc. review denied*, 365 N.C. 357, 718 S.E.2d 391 (2011); *see also Swain v. Preston Falls E., L.L.C.*, 156 N.C. App. 357, 361, 576 S.E.2d 699, 702 (explaining that contributory negligence acts as "a complete bar" to negligence claims), *disc. review denied*, 357 N.C. 255, 583 S.E.2d 290 (2003). "Contributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Piraino Bros.*, 211 N.C. App. at 351-52, 712 S.E.2d at 334 (citation and internal quotation marks omitted). "[T]he standard of ordinary care is an objective one[.]" *Williams v. Odell*, 90 N.C. App. 699, 702, 370 S.E.2d 62, 64, *disc. review denied*, 323 N.C. 370, 373 S.E.2d 557 (1988).

In the instant case, Dobbins stipulated to her negligence in the preparation of the deed, leaving the issue of the Bloomquists' damages for the jury. The Bloomquists maintained that, as a result of Dobbins' negligence, they have incurred hundreds of thousands of dollars in legal expenses defending the Maldjians' suit against them. As Dobbins explains in her brief, the Bloomquists were contributorily negligent, in that they "viewed [her] mistake as an opportunity; a chance to claim ownership of land they did not purchase. That decision resulted in litigation, which caused them to incur attorneys' fees."

Over the course of an eight-day trial, the jury reviewed exhibits and heard testimony from numerous witnesses in support of the Maldjians' claim that the parties intended to convey 22 acres of land, rather than 62 acres. Dobbins testified that she made numerous errors in handling this transaction, including her error in preparation of the deed mistakenly conveying the entire 62 acres of the Cana Road property to the Bloomquists. More importantly, in that it directly relates to the Bloomquists' damages, Dobbins also testified that she offered to correct the error in the deed at no charge.

Taken together, there was more than a scintilla of evidence from which the jury could find that any damage to the Bloomquists was caused, at least in part, by the Bloomquists' negligence or intentional wrongdoing. Where there was conflicting evidence as to whether the Bloomquists were contributorily negligent or engaged in intentional wrongdoing, then the trial court was required to submit this issue to the jury. *See Cobo*, 347 N.C. at 545, 495 S.E.2d at 365. The trial court, therefore, properly denied the Bloomquists' motions for directed verdict and JNOV as to their legal malpractice claim against Dobbins.

3. Negligence Claim Against Third-Party Realtor Defendants

[4] The Bloomquists also argue that the trial court erred in denying their motion for JNOV against Smith and Allen Tate Co. The Bloomquists posit that because their damages were "completely uncontested" by Smith and Allen Tate Co. who "stipulated to their negligence," the jury's verdict on this claim was inexplicable and JNOV was appropriate. This argument is without merit.

The verdict sheet to which the parties agreed provided the following question for the jury: "Were the Bloomquists damaged by the negligence of the Third-Party Defendants Kathy Smith and Allen Tate Co., Inc.?" Contrary to the Bloomquists' position, Smith and Allen Tate Co. did not stipulate to negligence by agreeing to the verdict sheet.

Indeed, it was evident at trial that Smith and Allen Tate Co. did not stipulate to negligence, as counsel's discussions regarding the proposed jury instructions clearly demonstrate:

> [Counsel for the Bloomquists]: *As to Kathy Smith, they are denying negligenc*e so –
>
> THE COURT: That's all one issue. It is negligence and proximate cause, so even though the instructions will be different –
>
> [Counsel for the Bloomquists]: Have you submitted a single issue[?]
>
> THE COURT: We have the attorneys' fees instruction yet with [counsel for Dobbins], but when you are talking about the negligence issue, that's – what are you saying is different?
>
> [Counsel for Smith and Allen Tate Co.]: We need an issue as to whether Kathy was negligent. *We didn't stipulate to negligence.*

(Emphases added).

Moreover, the trial court repeatedly made it clear in the jury instructions, to which the Bloomquists did not object, that Smith and Allen Tate Co. contested the Bloomquists' negligence claim. The trial court instructed the jury that

> [i]n this case the Bloomquists contend, and Kathy Smith and Allen Tate deny, that Kathy Smith and Allen Tate were negligent in one or more ways. The Bloomquists further

> contend, and Kathy Smith and Allen Tate deny, that the negligence of Kathy Smith and Allen Tate's [sic] was a proximate cause of the Bloomquists' damage.

In short, the premise that Smith and Allen Tate Co. stipulated to their negligence is specious.

Similarly incorrect is the Bloomquists' assertion that evidence of the third-party realtor defendants' negligence, or the Bloomquists' damages, was uncontested because Smith and Allen Tate Co. did not offer any evidence. The Bloomquists bore the burden of proving the negligence, if any, of Smith and Allen Tate Co., as well as their own damages, and it was within the jury's prerogative to reject the Bloomquists' evidence. *See Patterson v. Worley*, 265 N.C. App. 626, 628-29, 828 S.E.2d 744, 747 (2019); *Dobson v. Honeycutt*, 78 N.C. App. 709, 712, 338 S.E.2d 605, 607 (1986). It is beyond cavil that the jury considers all of the evidence properly before it, and the jury is not limited to considering evidence offered by certain parties regarding certain claims, as the Bloomquists suggest. *See Hancock v. Telegraph Company*, 142 N.C. 163, 165, 55 S.E. 82, 83 (1906) ("The jury has the right, and it is [its] duty, to consider all the evidence admitted by the Court."). Simply put, there was abundant evidence offered at trial to support the jury's verdict on this issue.

Finally, as with the Bloomquists' legal malpractice claim against Dobbins, even if the jury found that Smith and Allen Tate Co. were negligent, the evidence at trial nevertheless fails to support a reasonable conclusion that their actions proximately caused any damage to the Bloomquists. There was plentiful evidence at trial that the Bloomquists agreed to purchase 22 acres of the Cana Road property from the Maldjians, that Dobbins failed to properly prepare the deed, and that Dobbins subsequently offered to correct the error in the deed free of charge.

Considered in the light most favorable to Smith and Allen Tate Co., there was more than a scintilla of evidence from which the jury could find that Smith and Allen Tate Co. were not negligent, or that the actions of Smith and Allen Tate Co. were not the proximate cause of any damage to the Bloomquists. The trial court, therefore, properly denied the Bloomquists' motion for JNOV.

II. Exclusion of Evidence

Next, the Bloomquists raise several evidentiary issues. Specifically, they argue that the trial court erred by granting Dobbins' motions *in limine* excluding evidence of (1) Dobbins' offer to pay the Maldjians' legal costs through her liability insurance carrier; (2) the tolling agreement

between Dobbins and the Maldjians; and (3) Dobbins' alleged violations of the Rules of Professional Conduct. According to the Bloomquists, the excluded evidence shows Dobbins' bias against the Bloomquists, and would have revealed to the jury that Dobbins had joined a conspiracy with the Maldjians and the Bloomquists' realtor to defeat the Bloomquists' claims. We address each issue in turn.

A. Standard of Review

"When this Court reviews a decision to grant or deny a motion *in limine*, the determination will not be reversed absent a showing that the trial court abused its discretion." *Smith v. Polsky*, 251 N.C. App. 589, 594, 796 S.E.2d 354, 358 (2017). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Cameron v. Merisel Props., Inc.*, 187 N.C. App. 40, 52, 652 S.E.2d 660, 668-69 (2007) (citation omitted).

An objection to the trial court's ruling on "a motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence." *Xiong v. Marks*, 193 N.C. App. 644, 647, 668 S.E.2d 594, 597 (2008) (citation omitted). Rather, "a party objecting to an order granting . . . a motion *in limine*, in order to preserve the evidentiary issue for appeal, is required to . . . attempt to introduce the evidence at the trial (where the motion was granted)." *Id.* (citation omitted).

B. Legal Costs and Liability Insurance

[5] Before the parties began jury selection, the trial court granted Dobbins' motion *in limine* seeking to exclude any evidence that Dobbins offered to pay the Maldjians' legal costs through coverage provided by her professional malpractice carrier. During trial, the Bloomquists' counsel asked Mrs. Maldjian whether Dobbins told her that she would pay the Maldjian's legal costs, drawing Mrs. Maldjian's unsolicited reference to Dobbins' statement "that she had insurance." Counsel immediately objected and moved to strike Mrs. Maldjian's statement. The trial court sustained the objection, ordered that Mrs. Maldjian's reference to Dobbins' statement "that she had insurance" be stricken, and instructed the jury to disregard the reference to insurance. On appeal, the Bloomquists contend that this evidence should have been admitted to show that Dobbins "was biased against her clients, the Bloomquists, and favored their adversaries, the Maldjians." We disagree.

Pursuant to Rule 411 of the North Carolina Rules of Evidence, "[e]vidence that a person was or was not insured against liability is not

admissible upon the issue whether he acted negligently or otherwise wrongfully." N.C. Gen. Stat. § 8C-1, Rule 411. However, evidence of liability insurance may be admissible "when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." *Id.* Nonetheless, "[a] trial court must be diligent about determining if the asserted purpose for offering evidence of insurance is merely pretextual or too attenuated, for then the general rule would be exclusion." *Williams v. Bell*, 167 N.C. App. 674, 684-85 n.2, 606 S.E.2d 436, 443 n.2 (Elmore, J., concurring), *disc. review denied*, 359 N.C. 414, 613 S.E.2d 26 (2005).

To establish that evidence of liability insurance is admissible under Rule 411's collateral purpose exception, the trial court must determine that (1) the evidence is offered for a permissible purpose; (2) the evidence is relevant to establish such purpose; and (3) "the probative value of the relevant evidence [is] substantially outweighed by the factors set forth in Rule 403." *Id.* at 678, 606 S.E.2d at 439 (majority op.); *see also* N.C. Gen. Stat. § 8C-1, Rule 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). "The application of the Rule 403 balancing test remains entirely within the inherent authority of the trial court. Hence, the trial court's determination as a result of this balancing test will not be disturbed on appeal absent a clear showing that the court abused its discretion." *Schmidt v. Petty*, 231 N.C. App. 406, 410, 752 S.E.2d 690, 693 (2013) (citations and internal quotation marks omitted).

In the present case, the Bloomquists maintain that Rule 411 does not categorically prohibit the admission of evidence of Dobbins' malpractice liability insurance, in that Dobbins stipulated to her negligence and the evidence was offered for a collateral purpose. Assuming for the sake of argument that this contention is correct, the trial court properly considered the relevancy of this evidence to a showing of Dobbins' bias against the Bloomquists, as well as whether the probative value of the relevant evidence was substantially outweighed by the factors provided in Rule 403.

If this evidence were relevant to the issue of bias—which is far from clear—any probative value is substantially outweighed by the danger of unfair prejudice or confusion. To begin, it is unclear what Dobbins meant by the phrase "legal fees." Dobbins could have meant that she would assume responsibility for the minimal cost of correcting her error in the preparation of the initial deed, rather than that she would fund the

Maldjians' litigation. And if Dobbins' offer was to cover the cost of preparing and recording a new deed to correct her earlier mistake, she made the same offer to Dr. Bloomquist. In addition, it is undisputed that neither Dobbins nor her insurer had, in fact, paid any part of the Maldjians' legal costs or attorneys' fees. Thus, the probative value of this evidence appears slight, while the danger of confusion is more readily apparent.

Moreover, it is unclear that the Bloomquists suffered any prejudice from the trial court's ruling. Although the Bloomquists maintain that the trial court's ruling "deprived [them] of a key means of discrediting the testimony of an important adverse witness," Dobbins, the Bloomquists had no difficulty attacking Dobbins' credibility. By her own admission at trial, Dobbins made numerous mistakes concerning the title search and drafting of the deed, including preparing the deed such that the Maldjians conveyed the entire Cana Road property to the Bloomquists. Dobbins also testified that the deal was for the Maldjians to sell the Bloomquists 22 acres of the Cana Road property, not the entire parcel, and that Dr. Bloomquist admitted that he and Mrs. Bloomquist had mistakenly been deeded too much of the Maldjians' property. In that Dobbins' testimony throughout trial patently "favored [her] adversaries' " claim, the Bloomquists cannot show prejudice from the exclusion of evidence of Dobbins' offer to pay the Maldjians' legal costs through her malpractice insurance.

On these facts, we cannot say that the trial court's ruling was manifestly unsupported by reason. The contention that the jury would have reached a different result upon learning that Dobbins was insured and that she stated that she would pay for the Maldjians' legal costs rings hollow. *See Latta v. Rainey*, 202 N.C. App. 587, 603, 689 S.E.2d 898, 911 (2010) ("The exclusion of evidence constitutes reversible error only if the appellant shows that a different result would have likely ensued had the error not occurred." (citation omitted)). Therefore, the trial court's exclusion of this evidence was not an abuse of discretion.

C. The Tolling Agreement

[6] Prior to trial, the trial court heard Dobbins' motion *in limine*, seeking to exclude any evidence that she entered into a tolling agreement with the Maldjians as irrelevant and unduly prejudicial. The agreement tolled the statute of limitations on any claims that the Maldjians may have against Dobbins. The Bloomquists argued that evidence of the tolling agreement should be admitted, as it showed Dobbins' bias against them. The trial court granted Dobbins' motion *in limine* with regard to the tolling agreement. At trial, the Bloomquists attempted to introduce

this evidence, and the trial court precluded them from offering evidence of the tolling agreement. On appeal, the Bloomquists assert that the trial court erred in this evidentiary ruling, to the Bloomquists' prejudice. We disagree.

By entering into a tolling agreement, a potential "defendant agrees to extend the statutory limitations period on the [potential] plaintiff's claim, usu[ally] so that both parties will have more time to resolve their dispute without litigation." *Tolling Agreement*, *Black's Law Dictionary* (11th ed. 2019). Here, although Dobbins stipulated to her negligence, she offered to enter into a tolling agreement with both the Maldjians and the Bloomquists so that they could resolve the land dispute prior to seeking damages from her. The Maldjians chose to enter into a tolling agreement with Dobbins, and the Bloomquists chose instead to join Dobbins as a third-party defendant in the lawsuit with the Maldjians.

The Bloomquists first argue that the trial court erred in excluding evidence of the tolling agreement under Rule 408 of the North Carolina Rules of Evidence, which provides, in pertinent part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible.

N.C. Gen. Stat. § 8C-1, Rule 408. Indeed, it is evident that this Rule is inapplicable to a tolling agreement, which is not an offer to settle a disputed claim or a settlement agreement. *See id.* However, it is not clear that the trial court excluded the evidence pursuant to this Rule.

Rather, it appears that the trial court excluded evidence of the tolling agreement pursuant to Rule 403, which provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* § 8C-1, Rule 403. "The Rule 403 balancing test falls within the exclusive purview of the trial court, and therefore the court's decisions under Rule 403 will not be disturbed on appeal absent an abuse of discretion." *Williams v. McCoy*, 145 N.C. App. 111, 117, 550 S.E.2d 796, 801 (2001).

The trial court properly determined that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice or confusion of the issues. This evidence lends little to the Bloomquists' argument that Dobbins was biased against them. Dobbins offered to enter into a tolling agreement with the Bloomquists as well as the Maldjians. Moreover, Dobbins' testimony clearly supported the Maldjians' contentions. Finally, Dobbins' credibility was on attack throughout trial, which was centered on her negligence in handling the Maldjians and Bloomquists' real estate transaction. The fact that Dobbins entered into a tolling agreement to permit the Maldjians to sue her at a future date for her admitted malpractice would hardly seem to make Dobbins' testimony less credible, and would only serve to confuse the issues for the jurors.[1]

This evidence had little probative value, and that minimal value was abundantly outweighed by the danger of unfair prejudice or confusion of the issues. Accordingly, the trial court did not abuse its discretion by excluding this testimony.

D. Violations of the Rules of Professional Conduct

[7] The trial court also granted Dobbins' motion *in limine* to exclude evidence that Dobbins violated the North Carolina Rules of Professional Conduct. Although Dobbins stipulated to her negligence, the Bloomquists argued that evidence that her actions violated the Rules of Professional Conduct was necessary to show her bias against the Bloomquists, and to "illustrate[ ] the things that the Bloomquists were denied the ability to know because Dobbins was negligent and acted in derogation of the rules." (Internal quotation marks omitted). On appeal, the Bloomquists assert that the trial court erred in excluding evidence of Dobbins' violations of the Rules of Professional Conduct.

As previously explained, "[a] ruling on a motion *in limine* is merely preliminary and not final." *Xiong*, 193 N.C. App. at 647, 668 S.E.2d at 597 (citation and internal quotation marks omitted). "A trial court's ruling on a motion *in limine* is subject to change during the course of trial, depending upon the actual evidence offered at trial." *Id.* (citation and internal quotation marks omitted). "On appeal the issue is not whether the granting or denying of the motion *in limine* was error, as

1. The Bloomquists further assert that the cumulative effect of the trial court's error in excluding evidence of Dobbins' tolling agreement with the Maldjians "[w]hen considered in tandem" with Dobbins' offer to pay the Maldjians' legal costs through her professional malpractice carrier warrants a new trial. Given our determination that the trial court did not err by excluding evidence of Dobbins' liability insurance, this argument lacks merit.

that issue is not appealable, but instead whether the evidentiary rulings of the trial court, made during the trial, are error." *T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602-03, 481 S.E.2d 347, 349, *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). Thus, as our Supreme Court has explained, "a motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the movant fails to further object to that evidence at the time it is offered at trial." *Martin v. Benson*, 348 N.C. 684, 685, 500 S.E.2d 664, 665 (1998) (per curiam) (citation omitted).

In order to preserve for appeal an evidentiary issue raised in a motion *in limine*, the party objecting to the trial court's order granting the motion *in limine* must attempt to introduce the evidence at trial. *See Morris v. Bailey*, 86 N.C. App. 378, 383, 358 S.E.2d 120, 123 (1987). If the trial court prevents the party from offering such evidence, the party must then submit an offer of proof, setting forth the substance of the excluded evidence. *See Xiong*, 193 N.C. App. at 648-49, 668 S.E.2d at 597-98 (holding that the plaintiff waived appellate review of a grant of a motion *in limine* when he failed to make an offer of proof of the excluded evidence at trial).

In the case at bar, the trial court granted Dobbins' motion *in limine* with regard to the exclusion of any evidence of her violations of the Rules of Professional Conduct, but permitted the Bloomquists to question Dobbins about the acts at issue without mentioning the Rules. Specifically, after the Bloomquists' counsel conceded that "[i]t isn't all that important . . . that I use the word 'ethics,' " the trial court ruled that the attorneys were to "keep out any reference to ethics, ethics rules, et cetera. You are free to ask anything – don't touch on that or specific rules since negligence has already been apparently admitted." At trial, the Bloomquists adhered to the trial court's limitations, and cross-examined Dobbins on her actions (which were in violation of the Rules of Professional Conduct) without attempting to introduce evidence that her actions constituted *violations* of the Rules of Professional Conduct.

"Our review of the trial court's decision is precluded by [the Bloomquists] having failed to make an offer of proof and include that evidence in the record on appeal." *Morris*, 86 N.C. App. at 383, 358 S.E.2d at 123. Indeed, at the conclusion of the Bloomquists' cross-examination of Dobbins, their attorney stated, "subject to the discussion in chambers, we will later have an offer of proof"; however, this offer of proof, made the following day, only concerned the tolling agreement. Accordingly, the evidentiary issue raised by the Bloomquists regarding the exclusion of

evidence that Dobbins' actions violated the Rules of Professional Conduct is not properly before this Court. But even assuming, *arguendo*, that this issue were properly preserved, this alleged error would not warrant reversal. As previously explained in greater detail, Dobbins stipulated to her negligence, testified to her negligent acts, and was thoroughly examined about submitting affidavits on behalf of the Maldjians. This argument is overruled.

E. Cumulative Error

[8] The Bloomquists further contend that the aforementioned excluded evidence, taken as a whole, amounted to cumulative error because if admitted, this evidence would have permitted the Bloomquists to "demonstrate the scope and extent of the cabal that was conspiring against them." Although all of the excluded evidence pertained to Dobbins, the Bloomquists nevertheless claim that the exclusion of this evidence furthered the other parties' "counterfactual narrative" against the Bloomquists, to their prejudice.

In that we discern no error in the trial court's exclusion of the evidence of which the Bloomquists complain on appeal, the trial court's rulings cannot cumulatively be deemed prejudicial error.

Conclusion

For the foregoing reasons, we affirm (1) the trial court's judgment in accordance with the jury's verdicts, and (2) the trial court's order denying the Bloomquists' motion for judgment notwithstanding the verdict.

AFFIRMED.

Judges COLLINS and HAMPSON concur.

McKENZIE v. McKENZIE

[275 N.C. App. 126 (2020)]

ALESSANDRA McKENZIE, Plaintiff
v.
STEVEN McKENZIE, Defendant

No. COA19-1116

Filed 15 December 2020

1. Contempt—civil—purge provision—equitable distribution—refusal to pay distribution to spouse

After a husband refused to pay his wife the full balance of a money market account pursuant to an equitable distribution order, a civil contempt order and its purge provision—allowing the husband to purge himself of contempt by paying his wife the amount required under the equitable distribution order—were affirmed, even though the purge provision in a prior contempt order required the husband to pay the account's "gross balance" as of a later date, and the account had since accumulated passive gains. The wife was not entitled to any passive gains under the equitable distribution order, and the purge provision in the first contempt order did not bind the parties as to how the equitable distribution order should be construed. Moreover, the trial court had authority under N.C.G.S. § 5A-21(b2) to reconsider the purge conditions de novo.

2. Divorce—equitable distribution—motion for sanctions and attorney fees—refusal to pay distribution to spouse

Where a husband was repeatedly held in civil contempt for refusing to distribute an account balance to his wife pursuant to an equitable distribution order, the trial court's order denying the wife's motion for Rule 11 sanctions against the husband (for avoiding compliance with the equitable distribution order by filing frivolous motions, complaints, and appeals) was vacated and remanded for insufficient findings on material factual issues. However, the portion of the order denying the wife's request for attorney fees was affirmed because she failed to show the amount of fees incurred as a result of her husband's allegedly sanctionable behavior.

Appeal by Plaintiff from orders entered 6 March 2019 and 28 June 2019 by Judge A. Elizabeth Keever in Rowan County District Court. Heard in the Court of Appeals 21 October 2020.

Mark L. Hayes for the Plaintiff-Appellant.

Matthew J. Barton for the Defendant-Appellee.

DILLON, Judge.

Alessandra McKenzie appeals from the Order on Motions entered 6 March 2019, from the Order on Rule 52 Motion entered 28 June 2019, and from the Order on Contempt entered 28 June 2019.

I. Background

This is a domestic matter involving Steven McKenzie ("Husband") and Alessandra McKenzie ("Wife"), who were married in 1998 and separated in 2011. The present dispute involves Husband's refusal to pay money to Wife as ordered in the equitable distribution order and two subsequent orders finding Husband in civil contempt for his refusal. The more recent contempt order is before us in this appeal, where the main issue is whether the purge provision is appropriate.

In 2016, Husband was ordered, as part of an equitable distribution order (the "2016 ED Order"), to pay $236,014.00 by certified check to Wife. Specifically, the trial court ordered that:

> The balance of $236,014.00 in [a certain money market account (hereinafter the "Account")] shall be distributed to [Wife]. [Husband] shall immediately upon the filing of this judgment transfer this balance to [Wife] *by delivering a certified check* to [her attorney].

(Emphasis added.) Husband has never complied with this provision.

In 2017, on Wife's motion, Husband was found in civil contempt (the "2017 Contempt Order") for his refusal to comply with the above provision in the 2016 ED Order. The trial court ordered that Husband could purge himself of this continuing civil contempt – not by turning over the sum certain of $236,014.00 – but rather by "transferring the [then] gross balance [in the Account to Wife]". We note that the record does not reflect what that balance in the Account was when the 2017 Contempt Order was entered. In any event, the 2017 Contempt Order had no teeth: the trial court did not order Husband to be imprisoned to coerce his compliance.

In 2019, on Wife's motion, Husband again was found to be in civil contempt (the "2019 Contempt Order") for his continued refusal to comply with the 2016 ED Order. But unlike the prior contempt order, the 2019 Contempt Order had teeth: the trial court ordered Husband imprisoned until he purged himself. The trial court ordered that Husband could purge himself by paying $236,014.00 (representing the balance in the

Account as of the date the 2016 ED Order was entered), notwithstanding that the Account had grown in value to over $280,000.00.[1]

Wife moved for reconsideration of the purge provision contained in the 2019 Contempt Order to require Husband to pay the increase in the Account, for attorneys' fees, and for Rule 11 sanctions against Husband. The trial court denied Wife's motions. Wife appeals from those orders.[2]

II. Analysis

On appeal, Wife argues that the trial court erred by (1) entering a contempt order that allowed Husband to retain *the growth* in the Account and (2) concluding that Wife presented no evidence of Husband's sanctionable conduct.

A. Trial Court's Calculation of Husband's Payment

[1] Wife challenges the purge provision in the 2019 Contempt Order. Specifically, Wife argues that the trial court should have directed husband to transfer the entire balance contained in the Account – including the $53,888.00 passive gain which occurred since the 2016 ED Order was entered – to her. She argues that a proper reading of the 2016 ED Order mandates the interpretation that she is entitled to the passive increase. Alternatively, she argues that the trial judge entering the 2017 Contempt Order interpreted the 2016 ED Order as requiring her to receive the passive increase by requiring Husband to "transfer the [then] balance" in the Account to purge himself of that contempt. And, since the 2017 Contempt Order has not been reversed or vacated, Husband and the trial judge who entered the 2019 Contempt Order were bound by that interpretation of the 2016 ED Order as made by the trial judge entering the 2017 Contempt Order.

For the reasons explained below, we hold that the purge provision in the 2019 Contempt Order is appropriate and, therefore, the trial court did not err in denying Wife's motion to consider the purge provision.

Our civil contempt law is outlined in Chapter 5A of our General Statutes. N.C. Gen. Stat. §§ 5A-21 to 34 (2017). Under our statutes, a

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1. Husband was also found to be in civil contempt for failing to pay the distributive award as ordered in the 2016 ED Order. The purge provision in the 2019 Contempt Order also required Husband to pay this distributive award to purge himself of civil contempt. The distributive award portion of the purge provision is not being challenged in this appeal.

2. Wife petitioned our Court for *certiorari*. To the extent that Wife does not have an appeal as of right, we grant Wife's petition to aid in our jurisdiction.

party may be found to be in "continuing civil contempt" if (1) he is in violation of a prior order, (2) his violation of that prior order is willful, (3) he is able to comply or is able to take reasonable steps to comply with the order, (4) the order remains in force, and (5) the purpose of the order may still be served by compliance. N.C. Gen. Stat. § 5A-21(a).

When the trial court finds a party to be in continuing civil contempt, the court must instruct that party what he must do to "purge" himself of civil contempt. A party found to be in continuing civil contempt remains so until he *either* purges himself as specified in the contempt order *or* the court determines that one of the factors in subsection (a) of Chapter 5A-21 no longer applies; *e.g.*, he has complied with the order, his non-compliance is no longer willful, or the order is no longer in force, etc.

A party found in continuing civil contempt "*may* be imprisoned as long as the civil contempt continues, subject to [certain] limitations[.]" N.C. Gen. Stat. § 5A-21(b) (emphasis added). One limitation provides that if a party is in civil contempt for failing to pay a money judgment, other than a child support award, the party may only be imprisoned for 90 days. N.C. Gen. Stat. § 5A-21(b2). Of course, if it is found that the party is no longer in continuing civil contempt during this 90-day imprisonment – for example, it is found that the party's disobedience is no longer willful – he should be released before the 90 days are up, as his failure to comply with an order no longer meets the definition of "continuing civil contempt." *Id.*

In any event, a party who has been imprisoned for 90 days under Section 5A-21(b2) may be subject to 3 successive 90-day imprisonments, provided that he is first afforded a new hearing on each occasion to determine if he is still in continuing civil contempt. *Id.* Specifically, our General Assembly directs that "[b]efore the court may recommit a person to any additional period of imprisonment under this subsection, the court shall conduct a hearing **de novo**." *Id.* (emphasis added).

We must address a number of legal issues to resolve the ultimate issue regarding the validity of the purge provision contained in the 2019 Contempt Order.

First, we must determine what exactly Husband's obligation is under the 2016 ED Order. We hold by the plain language of that Order that Husband was obligated to pay a sum certain of $236,014.00; he was not ordered to turn over the Account itself, but rather to tender a certified check. Accordingly, under the terms of the 2016 ED Order, Wife is not entitled to any passive increase (or subject to risk for any

passive decrease in the Account itself) as she was not awarded the Account specifically.[3]

Second, we hold that the purge provision contained in the 2017 Contempt Order directing Husband to pay "the gross balance" in the Account, at that time a condition of purge, did not bind the parties as to how the 2016 ED Order should be construed. It is true that a purge provision *should* track the obligation contained in the judgment when the court is trying to coerce compliance. However, the purge provision does not always track the obligation. For instance, it may be that a party owes a judgment of $100,000, but that party only has the present ability to pay $30,000. It would be appropriate for the judge to order the party to pay only $30,000 to purge himself of the contempt. And if he pays the $30,000, he is no longer in contempt, but he still owes $70,000 on the judgment.

And third, because Husband was subject to being imprisoned when called before the trial court in 2019, we hold that the trial court had the authority to consider the purge condition anew when entering the 2019 Contempt Order. Section 5A-21(b2) provides that a person who has already been imprisoned for a period of 90 days is entitled to a *de novo* hearing to determine whether he will need to spend another 90 days in prison. N.C. Gen. Stat. § 5A-21(b2). This case, though, presents an odd situation because the 2017 Contempt Order did not subject Husband to any imprisonment. We conclude, though, that whenever a party appears before a judge and is subject to initial or additional imprisonment for a continuing civil contempt, the judge considering the show cause motion hears the matter *de novo*, irrespective of any prior civil contempt orders.

In conclusion, we affirm the 2019 Contempt Order.[4]

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3. Had Husband been directed to turn over the Account itself, Wife might have been entitled to any passive increase (or decrease) in that asset as part of the judgment, and therefore the payment of said increase could have been included in a purge condition. In *Conrad v. Conrad*, 82 N.C. App. 758, 348 S.E.2d 349 (1986), the wife was awarded an asset, namely a specific number of shares of stock, in an equitable distribution award. We held that the trial court, who found the husband in contempt for failing to turn over the shares of stock, acted appropriately by ordering the husband to pay the value of the *passive increases* from that stock, including stock splits and dividends, earned from the date of the original ED order as a condition of purge. *Id.* at 760, 348 S.E.2d at 350. If the value of the Account had decreased, the purge provision could *not* have awarded Wife damages as a condition of purge. It may be that Husband would have owed Wife damages for the decrease, but North Carolina follows the minority view that damages for failing to comply with an order cannot be awarded through a contempt proceeding. *See Hartsell v. Hartsell*, 99 N.C. App 380, 391, 393 S.E.2d 570, 577 (1990), *aff'd*, 328 N.C. 729, 403 S.E.2d 307 (1991).

4. We note that the 2019 Contempt Order provides for Husband to be imprisoned until he purges his contempt. However, this imprisonment is subject to the provisions of Section 5A-21(b2), limiting "the period of imprisonment [not to] exceed 90 days[.]"

B. Evidence of Sanctionable Conduct

[2] Wife sought Rule 11 Sanctions "based on [Husband's] abusive use of frivolous motions, complaints, and appeals to avoid compliance with the [2016 ED Order]." The trial court denied the motion, finding that she "failed to present any evidence upon which to base sanctions on [Husband's] actions in filing a Rule 60 Motion or appealing [the 2017 Contempt Order]." On appeal, Wife argues that the trial court's findings with respect to her motion for sanctions were insufficient.

We agree with Wife that the trial court's findings fail to address factual issues material to her request for sanctions, as her request was based on a number of actions taken by Husband, not just the filing of a Rule 60 Motion or a prior appeal. We vacate the Order on Motions to the extent that it denies Wife's request for sanctions and remand, directing the trial court to make further findings concerning Wife's motion for sanctions.

The trial court denied Wife's request for attorneys' fees because she failed to show the amount of fees incurred as the result of Husband's alleged sanctionable behavior. Wife contends on appeal that sanctions under Rule 11 can be imposed as a fine for bad behavior independent of attorneys' fees. Accordingly, we affirm that portion of the Order on Motions that denies Wife's request for attorneys' fees.

III. Conclusion

We affirm the 2019 Contempt Order.

Regarding the Order on Motions, we vacate and remand the trial court's order denying Wife's request for sanctions. We remand so that the trial court can make additional findings regarding factual issues raised by Wife's motion. However, we affirm the trial court's order denying Wife's request for attorneys' fees as part of any sanctions as the trial court did not err in finding that Wife had failed to meet her burden of showing the fees she paid as a result of Husband's sanctionable conduct.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges INMAN and YOUNG concur.

THE NEW HANOVER COUNTY BOARD OF EDUCATION, PLAINTIFFS
v.
JOSH STEIN, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, DEFENDANT, AND NORTH CAROLINA COASTAL FEDERATION AND SOUND RIVERS, INC., INTERVENORS

No. COA17-1374-2

Filed 15 December 2020

1. Appeal and Error—law in effect at time of appellate decision—enacted during pendency of appeal—case on remand from Supreme Court—considered by Court of Appeals

In an action concerning the payments specified in an agreement between the attorney general and meat-processing companies following the contamination of water supplies by swine waste lagoons, a new law passed during the pendency of the appeal (N.C.G.S. § 147-76.1) applied to the funds paid by the companies, since it applied to "all funds received by the State" and appellate courts generally apply the law in effect at the time their decision is rendered. The applicability of the new law was properly before the Court of Appeals on remand from the Supreme Court ("for any additional proceedings not inconsistent with this opinion") because it was a question of law on undisputed facts.

2. Appeal and Error—law in effect at time of appellate decision—enacted during pendency of appeal—different relief than sought in complaint

In an action concerning the payments specified in an agreement between the attorney general and meat-processing companies following the contamination of water supplies by swine waste lagoons, a new law passed during the pendency of the appeal (N.C.G.S. § 147-76.1) applied to the funds paid by the companies, and the Court of Appeals rejected the attorney general's argument that plaintiff was seeking an entirely new claim for relief before the appellate court. Plaintiff's amended complaint, which sought to enjoin the attorney general from distributing the funds to anyone other than the Civil Penalty and Forfeiture Fund, provided sufficient notice for relief under the new law—that all funds be deposited in the State treasury.

3. Attorney General—receipt of funds—swine waste lagoons—application of statute—state treasury

In an action concerning the payments specified in an agreement between the attorney general and meat-processing companies

following the contamination of water supplies by swine waste lagoons, a new law passed during the pendency of the appeal (N.C.G.S. § 147-76.1) applied to the funds paid by the companies, and the Court of Appeals concluded that the law required the attorney general and the companies to transfer and deposit all funds paid under the agreement to the state treasury rather than into a private bank account controlled by the attorney general.

Judge BRYANT dissenting.

Appeal by plaintiff from order entered 12 October 2017 by Judge Paul C. Ridgeway in Wake County Superior Court. Originally heard in the Court of Appeals 20 June 2018. *De Luca v. Stein*, 261 N.C. App. 118, 820 S.E.2d 89 (2018). Upon remand from the Supreme Court of North Carolina by opinion issued 3 April 2020. *New Hanover Cty. Bd. of Educ. v. Stein*, 374 N.C. 102, 840 S.E.2d 194 (2020).

Stam Law Firm, PLLC, by Paul Stam and R. Daniel Gibson, for plaintiff-appellants.

Attorney General Joshua H. Stein, by Deputy Solicitor General James W. Doggett and Special Deputy Attorney General Marc Bernstein, for defendant-appellee.

No supplemental briefing by intervenors.

TYSON, Judge.

I. Background

Smithfield Foods, Inc. and its subsidiaries: Brown's of Carolina, Inc., Carroll's Foods, Inc., Murphy Farms, Inc., Carroll's Foods of Virginia, Inc., and Quarter M Farms, Inc. (collectively, the "Companies"), own and operate swine farms throughout eastern North Carolina. In the mid-to-late 1990s, millions of gallons of swine waste overflowed the containment lagoons after storms and spilled into North Carolina waterways. The waste contaminated the waterways and impacted groundwater supplies.

The North Carolina Department of Justice Environmental Division (the "DOJ") filed a number of lawsuits against swine farms from which the waste had overflowed. *See, e.g.*, *Murphy Family Farms v. N.C. Dep't of Env't & Natural Res.*, 359 N.C. 180, 605 S.E.2d 636 (2004).

After months of negotiations, then Attorney General, Michael F. Easley, and the Companies entered into an agreement (the "Agreement") under which the Companies "agreed to lead the development and implementation of environmentally superior swine waste management technologies in North Carolina" and to pay for those costs.

The Companies additionally agreed to "pay each year for 25 years an amount equal to one dollar for each hog in which the Companies . . . have had any financial interest in North Carolina during the previous year, provided, however, that such amount shall not exceed $2 million in any year."

The Attorney General retained sole authority under the Agreement to award and distribute funds held in a private bank account to organizations of his choosing, if the funds are "used to enhance the environment of the State." The Attorney General developed the Environmental Enhancement Grant Program (the "EEG Program") to receive requests and facilitate the administration of these funds.

The Attorney General, after receiving EEG Program recommendations, retains sole discretion to select recipients of the funds and to allocate the amount awarded to each recipient, up to $500,000 per award. Once the grant recipients are selected, the recipient requests reimbursement, and the Attorney General orders the bank to disburse the funds. Since the Agreement was signed, the Attorney General has selected and distributed more than $24 million dollars in payments. The recipients and programs are not limited to the geographical areas of swine production, water quality improvement, or elimination of pollution, but include conservation projects and storm sediment.

Former Plaintiff, Francis X. De Luca ("De Luca"), filed his complaint on 18 October 2016. De Luca sought to preliminary and permanently enjoin the Attorney General from distributing payments made pursuant to the Agreement to anyone other than the Civil Penalty and Forfeiture Fund. *See* N.C. CONST. art. IX, § 7(a) ("the clear proceeds of all penalties and forfeitures and of all fines collected . . . shall be faithfully appropriated and used exclusively for maintaining free public schools").

The Attorney General filed a motion to dismiss De Luca's complaint on 19 December 2016. Plaintiff amended his complaint to add the New Hanover County Board of Education ("the Board") as a Plaintiff and to substitute Josh Stein, the current Attorney General of North Carolina, as Defendant on 25 January 2017.

The superior court entered an order granting the Attorney General's motion for summary judgment on 12 October 2017. That same day, the

superior court denied Plaintiffs' motion for summary judgment, dismissed Plaintiffs' complaint with prejudice, and dissolved the preliminary injunction. Plaintiffs filed their notice of appeal to this Court and a motion for temporary stay at the trial court on 25 October 2017.

This Court reversed the superior court. *See De Luca v. Stein*, 261 N.C. App. 118, 136, 820 S.E.2d 89, 100 (2018). Further, we held De Luca lacked standing to assert the civil penalty claim, but we determined the Board had standing as an "intended beneficiary of a portion of those monies." *Id.* at 126-28, 820 S.E.2d at 94-95. The Attorney General appealed to the Supreme Court based upon a dissent in this Court. De Luca did not seek review of his dismissal for lack of standing and subsequently filed a motion to be removed from the case. *New Hanover Cty. Bd. of Educ.*, 374 N.C. at 113, n.3, 840 S.E.2d at 202 n.3.

The day before oral arguments were heard at the Supreme Court, the Governor of North Carolina signed 2019 N.C. Sess. Laws 250 into law. The Board argued § 5.7 of 2019 N.C. Sess. Laws 250 ("§ 5.7") controlled the disposition of "the bulk of the money in controversy."

Our Supreme Court, over a dissent, reversed and remanded, holding these funds are not "the clear proceeds of all penalties and forfeitures and of all fines collected . . . shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. CONST. art. IX, § 7(a). The Supreme Court "remand[ed] this case to the Court of Appeals for any additional proceedings not inconsistent with this opinion." *New Hanover Cty. Bd. of Educ.*, 374 N.C. at 123-24, 840 S.E.2d at 209.

In a subsequent Order, the Supreme Court deleted a portion of footnote 8 in its opinion and substituted in part:

> [T]he parties agreed that the provisions of newly-enacted N.C.G.S. § 147-76.1 *would not have the effect of mooting this appeal* . . . we will refrain from attempting to construe N.C.G.S. § 147-76.1 or to apply its provisions to the facts of this case. We express no opinion as to what effect, if any, N.C.G.S. § 147-76.1 has on the agreement or on any past or future payments made thereunder.

New Hanover Cty. Bd. of Educ., 374 N.C. 260, n.8, 840 S.E.2d at 209 n.8 (emphasis supplied).

II. Jurisdiction

This case returns to this Court upon remand from the Supreme Court of North Carolina "to the Court of Appeals for any additional

proceedings not inconsistent with this opinion." *New Hanover Cty. Bd. of Educ.*, 374 N.C. at 123-24, 840 S.E.2d at 209. No issue of Plaintiff's lack of standing was raised before or ruled against the Board in the Supreme Court nor does the Attorney General assert the Board's lack of standing in supplemental briefing before this Court.

III. Summary Judgment Against the Board

[1] Section 5.7 became effective 1 July 2019 and provides:

> SECTION 5.7.(a) Article 6 of Chapter 147 of the General Statutes is amended by adding a new section to read:
> § 147-76.1. Require deposit into the State treasury of funds received by the State. (a) Definition. –For purposes of this section, the term "cash gift or donation" means *any funds provided*, without valuable consideration, *to the State*, for use by the State, *or for the benefit of the State*. (b) Requirement. –Except as otherwise specifically provided by law, all funds received by the State, including cash gifts and donation, shall be deposited into the State treasury. *Nothing in this subsection shall be construed as exempting from the requirement set forth in this subsection funds received by a State officer* or employee acting on behalf of the State. (c) Terms Binding. –Except as otherwise provided by subsection (b) of this section, the terms of an instrument evidencing a cash gift or donation are a binding obligation of the State. *Nothing in this section shall be construed to supersede*, or authorize a deviation from the terms of an instrument evidencing a gift or donation setting forth *the purpose for which the funds may be used*.

2019 N.C. ALS 250, 2019 N.C. Sess. Laws 250, 2019 N.C. Ch. 250, 2019 N.C. HB 200 (emphasis supplied). *See also* N.C. Gen. Stat. § 147-76 (2019).

The Board argues "no genuine issue of material fact exists that, the Attorney General received funds for the benefit of the State for a specific purpose and they are entitled to relief under § 5.7. As noted by the Supreme Court, both parties concede § 5.7 did not moot the case. 374 N.C. 260, n.8, 840 S.E.2d at 209 n.8. The Attorney General's supplemental brief "[did] not want to take a position on behalf of the Attorney General's office on specifically how § 5.7 would be enforced."

Neither party asserts there are any disputed facts to require further remand to the superior court. Our Supreme Court remanded to this

Court to determine "any additional proceedings not inconsistent with this opinion," and that remand includes determination of the applicability of the statute in question. *New Hanover Cty. Bd. of Educ.*, 374 N.C. at 124, 840 S.E.2d at 209.

The Attorney General is an agent in the executive branch of the State. Pursuant to the Agreement, he retains sole authority to determine recipients and order disbursement of the public funds held in a private bank account. Section 5.7 mandates "all funds received by the State, including cash gifts and donations, shall be deposited into the State treasury." N.C. Gen. Stat. § 147-76.1.

The Attorney General agrees he "accepts the funds [from the Companies] on behalf of the State." Section 5.7 controls the disposition of "all funds received by the State," whether cash gifts or donations. The statute clearly mandates these are public funds, they belong to the taxpayers of this State, and are required to "be deposited into the State treasury." N.C. Gen. Stat. § 147-76.1.

We disagree with our dissenting colleague that § 5.7 cannot apply to the case before us because of the date of its enactment. The Attorney General did not raise that issue on appeal, and he further agrees "courts may sometimes apply new law to the facts of a case even if the new law postdates the complaint." Our courts have held, "[t]he general rule is an appellate court *must* apply the law in effect at the time it renders its decision." *State v. Currie*, 19 N.C. App. 241, 243, 198 S.E.2d 491, 493 (1973) (citations omitted) (emphasis supplied).

An exception to the general rule exists if applying the statute "would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711, 40 L. Ed. 2d 476, 488 (1974). The Attorney General does not argue applying § 5.7 to this case would result in "manifest injustice." Nor does the Attorney General argue there is statutory direction not to apply § 5.7 to pending litigation, nor is there any legislative history to indicate that § 5.7 does not to apply to these admittedly public funds.

Section 5.7 applies to "all funds received by the State" and appellate courts must apply the law in effect at this time. *Currie*, 19 N.C. App. at 243, 198 S.E.2d at 493. Section 5.7 applies to all present and future funds paid under the Agreement and mandates their deposit into the State treasury.

> The legislative branch of government is without question the policy-making agency of our government. The General

> Assembly is well equipped to weigh all the factors surrounding a particular problem, balance the competing interests, provide an appropriate forum for a full and open debate, and address all of the issues at one time.

Cooper v. Berger, ___ N.C. App. ___, ___, 837 S.E.2d 7, 21 (2019) (citations and alterations omitted), *disc. review allowed*, 373 N.C. 584, 837 S.E.2d 886 (2020). Both chambers of the legislature enacted, and the Governor signed § 5.7 into law the day before the Supreme Court heard other issues on appeal in this case. The applicability of § 5.7 to these facts is properly before us. As purely a question of law on undisputed facts, there is no need for remand to the trial court.

IV. Amended Complaint Claim § 5.7

[2] Rather than arguing the application of § 5.7 would result in manifest injustice or provide a statutory direction to the contrary, the Attorney General argues the Board is seeking an entirely new claim for relief. The dissenting opinion overly generalizes precedent and states the Board's arguments concerning § 5.7 are novel. The Board's allegations are sufficient to provide the Attorney General with notice of the transactions and occurrences showing entitlement to relief and is well within the scope of this Court's jurisdiction.

Rule 8 of the Rules of Civil Procedure only requires a "short and plain statement" of "the transactions, occurrences, or series of transactions or occurrences." The only question is whether the complaint "gives notice of the events and transactions" that allows "the adverse party to understand the nature of the claim." *Haynie v. Cobb*, 207 N.C. App. 143, 149, 698 S.E.2d 194, 199 (2010).

Similarly, "[t]he prayer for relief does not determine what relief ultimately will be awarded. Instead, the court should grant the relief to which a party is entitled, whether or not demanded in his pleading." *Holloway v. Wachovia Bank & Trust Co.*, 339 N.C. 338, 346, 452 S.E.2d 233, 237-38 (1994).

North Carolina Rules of Civil Procedure Rule 54(c) specifically provides "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." N.C. Gen. Stat. § 1A-1, Rule 54(c) (2019). Rule 54(c)'s purpose is to provide "whatever relief is supported by the complaint's factual allegations and proof at trial." *Holloway*, 339 N.C. at 346, 452 S.E.2d at 237. If the party makes a demand for relief, it is "not crucial that the wrong relief had been demanded." *Id.* at 346, 452 S.E.2d at 238 (citations omitted).

The Board's original prayer for relief seeks deposit of these funds into the State treasury in the Civil Penalty and Forfeiture Fund, and the pleadings cite Article IX of the North Carolina Constitution. The complaint alleges the Attorney General, while representing and as an agent of the State "entered into an agreement with [the Companies]" and attaches a copy of that Agreement.

The amended complaint also alleges the Companies are depositing $2 million dollars of admittedly public funds per year into a private bank account for public environmental purposes and under the Agreement, the Attorney General purports to exercise sole authority to allocate and distribute these sums to his chosen recipients. The Board requested a preliminary and permanent injunction against the Attorney General to prevent distribution of these funds. The prayer for relief alleges a current and ongoing course of future payments of public funds under the Agreement.

These allegations provide sufficient notice to the Attorney General and states a claim under § 5.7. Whether the funds should be deposited into the State treasury for further appropriation and distribution or be earmarked for the Civil Penalty and Forfeiture Fund is immaterial as juxtaposed with deposits of public funds into a private bank account with distributions therefrom and recipients thereof within the Attorney General's sole discretion and control. The Board's complaint states a claim for relief. *See id.* at 345-46, 452 S.E.2d at 237-38.

Our Supreme Court remanded to this Court the task of determining additional proceedings regarding § 5.7. *New Hanover Cty. Bd. of Educ.*, 374 N.C. at 124, 840 S.E.2d at 209. This Court "must apply the law in place at the time it renders its decision." *Currie*, 19 N.C. App. at 243, 198 S.E.2d at 493. The Board's amended complaint "gives notice of the events and transactions" and allows "the adverse party to understand the nature of the claim." *Haynie*, 207 N.C. App. at 149, 698 S.E.2d at 199. This Court may issue an opinion and judgment and grant relief to which the party is entitled, even if the party has not demanded such relief in his pleadings." N.C. Gen. Stat. § 1A-1, Rule 54(c).

V. North Carolina Constitution

[3] "Legislative—rather than executive—authority over the State's expenditure of funds was intrinsic to the State's founding." *Cooper v. Berger*, ___ N.C. App. at ___, 837 S.E.2d at 16 (citations and internal quotations omitted). In *Cooper v. Berger*, the Governor claimed the right to allocate certain federal grants designated to the State.

The General Assembly disagreed and passed their budget to prevent the Governor from access to the federal grants. *Id.* at ___, 837 S.E.2d at 12. This Court relied upon the North Carolina Constitution and the General Assembly's authority and purpose to appropriate federal funds and grants, and held the General Assembly rightfully reallocated the funds. *Id.* at ___, 837 S.E.2d at 9-16. "Nothing shows that the founders of this State, in drafting our Constitution, intended for the Executive Branch to wield such authority over a category of funds . . . and that it could do so free from legislative control, appropriation, and substantial oversight." *Id.* at ___, 837 S.E.2d at 21-22.

North Carolina's courts have not permitted members of the executive branch to exercise unbridled appropriation or expenditure of unbudgeted public funds. "The Attorney General is not only the State's chief law enforcement officer but a steward of our liberties." *In re Investigation by Attorney General*, 30 N.C. App. 585, 589, 227 S.E.2d 645, 648 (1976).

The stated purpose of the public funds being used for environmental purposes was not changed by the statute. The statute mandates the location and depository where the public money is to be deposited and held. All funds due or held under the Agreement must be paid and deposited into the State treasury, rather than into a private bank account under the exclusive control and discretion of the Attorney General.

Further, "[p]ursuant to Section 7(2) of Article III of the North Carolina Constitution, it shall be the duty of the Attorney General: (6) To pay all moneys received for debts due or penalties to the State immediately after the receipt thereof into the treasury." N.C. Gen. Stat. § 114-2(6) (2019). Our Supreme Court held "the payments contemplated by the agreement did not constitute penalties[.]" *New Hanover Cty. Bd. of Educ.*, 374 N.C. at 123, 840 S.E.2d at 209. Where the "debts due" and amounts currently held, and where future annual payments are to be paid to the State pursuant to the Agreement, are not in dispute. *See* N.C. Gen. Stat. § 147-76.1(b).

The State Treasurer must receive, hold, and account for the disbursement of these funds in accordance with the stated environmental purposes in the Agreement. "No money shall be drawn from the State treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually." N.C. Const. art. V, § 7(1). Section 5.7 requires all public funds held and due under the Agreement from the Companies to be deposited into the State treasury. N.C. Gen. Stat. § 147-76.1.

VI. Conclusion

> (a) Definition. –For purposes of this section, the term "cash gift or donation" means any funds provided, without valuable consideration, to the State, for use by the State, or for the benefit of the State. (b) Requirement. –Except as otherwise specifically provided by law, all funds received by the State, including cash gifts and donation, shall be deposited into the State treasury. *Nothing in this subsection shall be construed as exempting from the requirement set forth in this subsection funds received by a State officer or employee acting on behalf of the State.*

N.C. Gen. Stat. § 147-76.1(a)-(b) (emphasis supplied).

"[A]n appellate court must apply the law in effect at the time it renders its decision." *Currie*, 19 N.C. App. at 243, 198 S.E.2d at 493 (citations omitted). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d. 1, 3 (2006) (citations omitted).

No party challenged the Board's standing to seek funds from that public source for the benefit of New Hanover County public schools and their programs, consistent with the environmental purposes for which the funds may be used. "[T]he legal theory set forth in the complaint does not determine the validity of the claim[.]" *Enoch v. Inman*, 164 N.C. App. 415, 417, 596 S.E.2d 361, 363 (2004) (citation omitted). "Rule 54(c) provides that every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." *Holloway*, 339 N.C. at 345, 452 S.E.2d at 237 (internal quotation marks omitted).

In the absence of any disputed issues of fact and the applicability of the statute purely a question of law, we reverse and remand to the trial court for entry of an order to compel the Companies and the Attorney General to transfer and deposit all funds presently held and those to be paid and received from the Companies under the Agreement in the future into the State treasury in compliance with § 5.7. N.C. Gen. Stat. § 147-76.1. *It is so ordered.*

REVERSED AND REMANDED.

Judge BERGER concurs.

Judge BRYANT dissents with separate opinion.

BRYANT, Judge, dissenting.

I. Introduction

The majority has held that the trial court erred in granting summary judgment in favor of the State based on 2019 N.C. Sess. Laws 250, sec. 5.7(a), (c) (codifying N.C. Gen. Stat. § 147-76.1, effective 1 July 2019). Because I do not believe the New Hanover County Board of Education ("the Board") has standing to argue this issue, I respectfully dissent from the majority's opinion reversing and remanding this case.

II. Standing

In its original appeal to this Court, the Board did not raise the issue of sec. 5.7. It could not, as that law was only passed during the pendency of the appeal. This Court did not address that issue. Nor, as the majority concedes, did our Supreme Court address the issue, save in a footnote, noting that "we will refrain from attempting to construe N.C.G.S. § 147-76.1 or to apply its provisions to the facts of this case. We express no opinion as to what effect, if any, N.C.G.S. § 147-76.1 has on the agreement or on any past or future payments made thereunder." *New Hanover Cty. Bd. of Educ. v. Stein*, 374 N.C. 102, 124 n.8, 840 S.E.2d 194, 209 n.8 (2020) *as modified*, 374 N.C. 260 (N.C. May 18, 2020).

In short, neither the trial court, this Court, nor our Supreme Court initially addressed this issue. Rather, in consideration of the issue before it, our Supreme Court held that

> the Court of Appeals erred by determining that the record disclosed the existence of genuine issues of material fact that precluded the entry of summary judgment in favor of either party and remanding this case to the Superior Court, Wake County, for a trial on the merits, . . . [and that] the trial court correctly decided to enter summary judgment in favor of the Attorney General on the grounds that the payments contemplated by the agreement did not constitute penalties for purposes of article IX, section 7.

Id. at 123, 840 S.E.2d at 209. The Supreme Court remanded the matter to this Court "for any additional proceedings not inconsistent with this opinion." *Id.* at 124, 840 S.E.2d at 209.

The issue raised by the Board concerning sec. 5.7 is novel. It was not addressed by the trial court, nor by our Supreme Court. It is not,

therefore, an "additional proceeding" as contemplated by the Supreme Court's mandate, but an entirely new proceeding which a trial court of competent jurisdiction must rule on before this Court may consider arguments. The majority's statement that the Supreme Court's "remand includes determination of the applicability of the statute in question," is simply not the case.

"Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Shelly*, 181 N.C. App. 196, 206–07, 638 S.E.2d 516, 524 (2007) (citation omitted). Given that the Board has not yet raised this issue before the trial court, it is clear that the issue of sec. 5.7 was not a suitable "additional proceeding" as expressed by the Supreme Court's mandate. "On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court." *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962) (citation omitted). Our review on remand is properly limited to those issues the Board previously raised—sec. 5.7 is not among them.

Nor do I believe that the Supreme Court's mandate enables us to consider issues not properly raised before the trial court. Our jurisdiction as an appellate court is well-defined. *See* N.C. Const. art. IV, § 12(1) ("The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe."); N.C. Gen. Stat. § 7A-26 ("[T]he Court of Appeals . . . ha[s] jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice and of administrative agencies, upon matters of law or legal inference, in accordance with the system of appeals provided in this Article."). I am unaware of any precedent which would permit us to overstep our jurisdictional authority and consider this issue for the first time on appeal. The majority's references to Rule 8 and Rule 54(c) of the Rules of Civil Procedure as allowing relief to a party even if the party has not demanded such relief in its pleadings is inapposite. The Rules of Civil Procedure apply to our trial courts. *See* N.C. Gen. Stat. § 1A-1, Rule 1 ("Scope of Rules") ("These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when differing procedure is prescribed by statute."); *cf.* N.C.R. App. P. Rule 1(b) ("Scope of Rules") ("These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division. . . ."). The majority points to no authority which authorizes this appellate court to act with the statutory authority conferred upon our trial courts to enter civil judgments pursuant to Rule 54(c). Our

appellate courts are authorized to determine whether the trial courts properly applied the Rules of Civil Procedure. We are not authorized to substitute those rules for the rules which govern our review on appeal.

III. Conclusion

I believe the appropriate venue for the Board's claim under sec. 5.7 is in the trial court. It is premature for this Court to rule on such a claim before a trial court has done so. I would therefore dismiss any arguments concerning sec. 5.7 as unripe and hold that the Board lacks the standing to raise them until they have been addressed by a trial court of competent jurisdiction. In accordance with the Supreme Court's mandate, and as stated in my previous dissent in this matter, I would find no error in the trial court's ruling to grant summary judgment in favor of the State.

For the foregoing reasons, I respectfully dissent.

BROWN OSBORNE AND WIFE, JENNIFER OSBORNE, PLAINTIFFS
v.
REDWOOD MOUNTAIN, LLC, DEFENDANT

No. COA20-186

Filed 15 December 2020

1. Appeal and Error—denial of motion to change venue—interlocutory—direct appeal

In an action by plaintiffs to establish their right to use a roadway that crossed defendant's property, defendant's interlocutory appeal from the trial court's denial of its motion to change venue as a matter of right under N.C.G.S. § 1-76 was directly appealable and properly before the Court of Appeals.

2. Venue—motion to change—property located in multiple counties

In an action by plaintiffs to establish their right to use a roadway that crossed defendant's property where all or some of the roadway was within Wilkes County and both parties' properties were within Wilkes and Alexander Counties, the trial court did not err by denying defendant's motion to change venue from Wilkes County to Alexander County. Wilkes County was an appropriate venue since the subject of the action was located, at least in part, in that county.

3. Appeal and Error—res judicata—collateral estoppel—not raised at trial—dismissal

In an interlocutory appeal involving an action brought by plaintiffs to establish their right to use a roadway that crossed defendant's property, defendant's arguments on appeal that plaintiffs' action was barred based on res judicata and collateral estoppel were dismissed because these arguments had not yet been raised in the trial court and could not be raised for the first time on appeal.

Appeal by defendant from order entered 18 October 2019 by Judge Michael D. Duncan in Wilkes County Superior Court. Heard in the Court of Appeals 20 October 2020.

Joines & James, P.L.L.C., by Timothy B. Joines and Carmen James, for plaintiffs-appellees.

THB Law Group, by Brian W. Tyson, for defendant-appellant.

ZACHARY, Judge.

Defendant Redwood Mountain, LLC, appeals from an order denying its motion for change of venue. After careful review, we affirm in part and dismiss in part.

I. Background

Plaintiffs Brown and Jennifer Osborne ("the Osbornes") brought this action to establish their right to use a roadway that crosses the property of Defendant Redwood Mountain, LLC ("Redwood") in order to access their property, and to enjoin Redwood from further interfering with their use of the roadway. The Osbornes own land in Wilkes and Alexander Counties; Redwood also owns land in Wilkes and Alexander Counties, adjacent to the Osbornes'. There is some dispute between the parties as to whether the roadway at issue lies entirely in Wilkes County, or runs through Wilkes and Alexander Counties.

A.

In 2002, the Osbornes filed suit against Almedia Myers and Darryl and Sharon Little, seeking a declaratory judgment that the Osbornes had "an appurtenant easement and right of way for ingress, egress, and regress over the existing roadway" to the real property that they purchased in 1977 and 1978. The Osbornes then amended their complaint to reflect that (1) the Littles had conveyed their interest in the property to Charles and Blair Craven, who were the current record owners of the

portion of the land previously owned by the Littles; and (2) in 2003, the Cravens granted the Osbornes an easement across their property over the existing roadway. On 9 April 2003, the Osbornes filed a voluntary dismissal of the action against the Littles and Cravens, leaving Myers as the sole defendant.

Myers failed to file any responsive pleadings, and on 10 April 2003, the Wilkes County Clerk of Superior Court entered default against her. On 2 September 2003, this matter came on for trial before the Honorable Andy Cromer. The trial court entered judgment (the "2003 Judgment") in favor of the Osbornes, setting forth the metes and bounds description of the easement, and finding in part that the "roadway [wa]s located entirely in Wilkes County, North Carolina."

B.

In June 2018, Redwood purchased real property adjacent to the Osbornes', and erected a gate across the roadway. After that gate was removed, Redwood erected a second gate across the roadway. On 15 February 2019, the Osbornes filed a complaint in Wilkes County Superior Court alleging that Redwood had obstructed their access to the easement provided in the 2003 Judgment. The Osbornes asked that the court enjoin Redwood from interfering with their use of the roadway, and enter "a declaratory judgment that the [Osbornes] have . . . a valid prescriptive easement across the" roadway, or, in the alternative, order that the Osbornes have the right to use the roadway by virtue of a prescriptive easement, and enjoin Redwood from interfering with their use of the roadway.

On 7 May 2019, Redwood filed a motion to change venue pursuant to Rule 12(b)(3) of the North Carolina Rules of Civil Procedure. Specifically, Redwood sought to transfer the case from Wilkes County to Alexander County, where it alleges some portion of the roadway is located, as well as much of Redwood's 81-acre tract. On 7 October 2019, Redwood's motion came on for hearing in Yadkin County Superior Court before the Honorable Michael D. Duncan. By order entered 18 October 2019, the trial court denied Defendant's motion.

Redwood timely filed notice of appeal.

II. Interlocutory Jurisdiction

[1] Both parties recognize that the instant appeal is interlocutory, as it "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). The "[d]enial of

a motion for change of venue as a matter of right under N.C. Gen. Stat. § 1-76, although interlocutory, is directly appealable." *Fox Holdings, Inc. v. Wheatly Oil Co.*, 161 N.C. App. 47, 51, 587 S.E.2d 429, 432 (2003); *accord First S. Sav. Bank v. Tuton*, 114 N.C. App. 805, 807, 443 S.E.2d 345, 346, *disc. review denied*, 338 N.C. 309, 452 S.E.2d 309 (1994); *Pierce v. Associated Rest & Nursing Care, Inc.*, 90 N.C. App. 210, 211, 368 S.E.2d 41, 42 (1988). Accordingly, this appeal is properly before us.

III. Standard of Review

This Court has articulated a two-step analysis for review of issues of venue. "The first step is determining the proper venue for a case, which is based upon the substantive statute for the particular type of claim. This determination of proper venue under the substantive statute presents a question of law which is reviewed de novo." *Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218, 225, 791 S.E.2d 100, 105 (2016) (italics omitted). The next step is "determining whether a change of venue is appropriate under the procedural statute regarding changes of venue, which in this instance appears to be N.C. Gen. Stat. § 1-83." *Id.*

IV. Motion to Change Venue

[2] The sole issue on appeal is whether the trial court erred in denying Defendant's motion to change venue pursuant to Rule 12(b)(3) of our Rules of Civil Procedure. Rule 12(b)(3) provides that "[e]very defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . [i]mproper venue or division[.]" N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) (2019).

"Venue" is defined as "the proper or a possible place for a lawsuit to proceed, usually because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant." *Stokes v. Stokes*, 371 N.C. 770, 773, 821 S.E.2d 161, 163 (2018) (quoting *Venue*, *Black's Law Dictionary* (10th ed. 2014)). It follows that "[t]he authority . . . to remove a cause instituted in a county which is not the proper one . . . is the power to change the place of trial." *Lovegrove v. Lovegrove*, 237 N.C. 307, 309, 74 S.E.2d 723, 725 (1953) (internal quotation marks omitted).

It has long been understood that venue is regulated by statute. *See Interstate Cooperage Co. v. Eureka Lumber Co.*, 151 N.C. 455, 456, 66 S.E. 434, 435 (1909) ("The venue of civil actions is a matter for legislative regulation, and is not governed by the rules of the common law."). Indeed, for certain causes of action the appropriate venue is designated

by statute. *See*, *e.g.*, N.C. Gen. Stat. § 1-78 ("All actions against executors and administrators in their official capacity, except where otherwise provided by statute, and all actions upon official bonds must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county."); *Id.* § 1-81 ("In all actions against railroads the action must be tried either in the county where the cause of action arose or where the plaintiff resided at that time or in some county adjoining that in which the cause of action arose, subject to the power of the court to change the place of trial as provided by statute.").

However, there are specific venue statutes for only a limited number of actions; thus, it is well established that "all civil actions are governed by venue statutes of general application, see N.C. Gen. Stat. §§ 1-82 through 1-84, *unless subject to a venue statute of more specific application*." *Dechkovskaia v. Dechkovskaia*, 244 N.C. App. 26, 31, 780 S.E.2d 175, 180 (2015) (emphasis added).

N.C. Gen. Stat. § 1-83, which serves as the procedural basis for Redwood's motion to change venue, addresses the trial court's obligation to transfer an action to the proper venue upon timely motion:

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.
>
> The court may change the place of trial in the following cases:
>
> (1) When the county designated for that purpose is not the proper one.

N.C. Gen. Stat. § 1-83(1). If the county where the suit is filed is improper, "the trial court does not have discretion, but *must* upon a timely motion and upon appropriate findings transfer the case to the proper venue." *Cheek v. Higgins*, 76 N.C. App. 151, 153, 331 S.E.2d 712, 714 (1985) (emphasis added).

Here, the issue presented involves the Osbornes' access to a roadway easement. Hence, the applicable specific substantive venue provision is N.C. Gen. Stat. § 1-76, which provides:

> Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by law:
>
> > (1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

N.C. Gen. Stat. § 1-76(1).

After careful review, it is evident that Wilkes County is an appropriate venue for this action. As written, the statute requires that particular real property actions "must be tried in the county in which the subject of the action, or some part thereof, is situated." *Id.* The parties agree that either all or some portion of the roadway lies in Wilkes County, and both parties' properties lie in Wilkes and Alexander Counties. Moreover, the 2003 Judgment, which was attached as Exhibit A to the Osbornes' complaint, found that the easement was located entirely in Wilkes County. The "subject of the action" is located in Wilkes County, at least in part.

Redwood cites *Rose's Stores, Inc. v. Tarrytown Center* for the principle that "[w]hen the title to real estate may be affected by an action, this Court has consistently held the action to be local and removable to the county where the land is situate by proper motion made in apt time." 270 N.C. 201, 203, 154 S.E.2d 320, 321 (1967). Redwood acknowledges in its brief that the instant action "directly affects [its] title to the [p]roperty in its entirety."

However, title to the real property *in Wilkes County* will also be affected by the outcome of this case. N.C. Gen. Stat. § 1-76(1) does not provide that proper venue lies in the county containing more of the subject real property, only that the case "be tried in the county in which the [real property which is] the subject of the action, *or some part thereof*, is situated[.]" (Emphasis added). Wilkes County is a proper county for trial of this action. Accordingly, we affirm the trial court's denial of Redwood's motion.

V. Res Judicata and Collateral Estoppel

[3] Redwood next posits that "[i]n addition to the other arguments as outlined within this brief, . . . the [Osbornes'] action and Complaint are barred in Wilkes County based on the doctrines of res judicata and collateral estoppel by judgment."

However, "[a] contention not raised in the trial court may not be raised for the first time on appeal." *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002); *see also Rheinberg-Kellerei GMBH v. Vineyard Wine Co.*, 53 N.C. App. 560, 566, 281 S.E.2d 425, 429 ("This issue was not presented in the pleadings nor does the record reveal that the issue was raised at trial. [The p]laintiff cannot now present this theory on appeal."), *disc. review denied*, 304 N.C. 588, 289 S.E.2d 564 (1981).

Here, Redwood did not raise its contentions regarding res judicata and collateral estoppel at the trial level, and they cannot be presented for the first time on appeal. Because the trial court has not had an opportunity to rule on these arguments, they are not properly before us, and we dismiss this portion of Redwood's appeal.

VI. Conclusion

"While a party has a right to a legally proper venue, a party does not have a right to a preferred venue." *Stokes*, 371 N.C. at 774, 821 S.E.2d at 164. Pursuant to N.C. Gen. Stat. § 1-76(1), the Osbornes filed the instant action in a proper county. Accordingly, we affirm the trial court's order denying Redwood's motion for change of venue.

Redwood raises its arguments regarding res judicata and collateral estoppel for the first time on appeal, and thus we dismiss that portion of its appeal.

AFFIRMED IN PART; DISMISSED IN PART.

Judges MURPHY and COLLINS concur.

SHERRILL v. SHERRILL

[275 N.C. App. 151 (2020)]

JAY FRANKLIN SHERRILL, PLAINTIFF
v.
LINDA ANN SHERRILL, DEFENDANT

No. COA19-429

Filed 15 December 2020

Child Custody and Support—permanent custody order—conclusions of law—not supported by findings of fact

A permanent custody order denying defendant-mother both custody and visitation was reversed and remanded where the trial court's findings of fact that defendant admitted to intentionally touching the child's penis and made inappropriate comments about the child's genitals were not supported by the evidence; the other findings challenged on appeal did not resolve the crucial factual dispute regarding whether the touching was accidental or intentional and sexually inappropriate; and the court failed to make a clear ultimate finding characterizing the touching as intentional and inappropriate. Further, the remaining findings of fact were mostly positive toward defendant, showed she was the primary caretaker, and did not support a conclusion that defendant was not a fit and proper person for custody or visitation.

Appeal by defendant from order entered 20 December 2018 by Judge Charlie Brown in District Court, Rowan County. Heard in the Court of Appeals 13 November 2019.

Hick McDonald Noecker LLP, by David W. McDonald, for plaintiff-appellee.

Fox Rothschild LLP, by Michelle D. Connell, for defendant-appellant.

STROUD, Judge.

Mother appeals from a permanent custody order granting sole legal and physical custody to Father, with no visitation for Mother. Because the trial court's findings of fact do not support its conclusion that Mother is not a fit and proper person to have custody or visitation of her minor child, we must reverse and remand for further proceedings and entry of a new order.

I. Background

Mother and Father married in November 2003 and in June 2004, Henry,[1] the parties' only child, was born. After he was injured in an automobile accident in 2004, Father began sleeping separately from Mother in a different bedroom. Because of health issues earlier in life, Henry slept in the bed with Mother, and this continued until 2016. Both parties acknowledged the sleeping arrangements were a source of conflict in their marriage.

The parties separated in March 2017, when Mother left the parties' marital home. Father and Henry continued to live in the marital home. After separation, Mother continued to take Henry to school each day. On 6 April 2017, Father filed a complaint for custody and child support. Father also filed an ex parte motion for temporary custody, based upon his allegation that Mother had told him "she will take the minor child from him and that he will never see the minor child again." The trial court granted the ex parte temporary custody order and set a hearing to determine whether to continue the temporary order. During the return hearing on the ex parte motion, Henry talked to the judge in his chambers, and for the first time, he disclosed Mother had improperly touched him on or about 26 November 2016. Based upon this disclosure, the incident was reported to DSS and law enforcement. The allegations were investigated twice by DSS and were unsubstantiated, and the District Attorney's Office declined to prosecute. On 17 May 2017, the trial court entered a temporary custody order which granted Father full legal and physical custody of Henry. Mother consented to pay child support.

The permanent custody trial was held on 20 March, 22 March, and 4 April 2018. At the beginning of the trial, the parties agreed to allow Henry to testify in chambers with only their counsel present. The permanent custody order was entered on 20 December 2018 and found relevant to the issue on appeal:

> 19. That the reported touching by [Mother] of the minor child occurred around Thanksgiving of 2016. The first report by the minor child of any alleged touching occurred at the hearing on April 18, 2017.
>
> 20. That [Mother] was the primary parent involved with the minor child and his medical, school, and extracurricular activities prior to [Father's] injury in 2014. [Father] admits he worked "long hours" with NASCAR

1. We use a pseudonym to protect the privacy of the minor child.

until his injury when the minor child was ten years of age. [Mother] often took the minor child to educational and recreational events, including the North Carolina Transportation Museum, Carowinds, Discovery Place, Whitewater Park, Tiger World wildlife preserve, Harlem Globetrotters basketball games, Ringling Brothers Circus events, Carolina Panthers football games, Catawba College football games, Kannapolis Intimidators minor league baseball games, NASCAR Hall of Fame and races, monster truck shows, zoo, air shows, train excursions, museums, library, church, ball practice, go-kart race tracks, swimming pools and lakes, and more. [Mother's] Exhibits 11, 12, and 13 are incorporated by reference.

21. That [Mother] took the minor child to the large majority of his doctor and dental appointments.

22. That [Mother] attended the large ·majority of the minor child's basketball and baseball games for years. The maternal grandmother and uncle also attended many of the minor child's basketball and baseball games.

23. That [Mother] has maintained health insurance for years on the minor child.

24. That [Mother] pays Four Hundred Fourteen Dollars and Fifty Cents ($414.50) per month in child support for the minor child and is current in her child support obligation.

25. That [Mother] took the minor child to school every day prior to entry of the Temporary Custody Order signed on April 6, 2017 (filed April 7, 2017).

26. That since the entry of the Temporary Order on April 18, 2017, [Mother] has sent four or five letters to the minor child as well as a cell phone, clothes, gift cards, money, a wallet, and miscellaneous items. These letters and gifts have been sent over time, including the minor child's birthday and Christmas. [Mother]'s Exhibits 3 and 4 are incorporated by reference.

27. That on October 29, 2017, [Mother], after sharing her inability to talk to the minor child, sent an email to

the minor child's teacher seeking help from a tutor for the minor child. [Mother's] Exhibit 5 is incorporated herein by reference.

28. That during the marriage [Mother] established a college fund for the minor child.

29. That prior to the parties' separation, the minor child had a good relationship with the maternal grandparents and uncle, spending quality time with them on many occasions.

30. That [Mother] attended counseling post-separation with Jabez Family Outreach to address issues between her and the minor child.

31. That [Mother] has a suitable and appropriate three bedroom, two-bath home.

32. That on April 6, 2017, [Father] filed a Complaint for Custody and Child Support and an Ex Parte Motion for Temporary Custody to Maintain Status Quo.

33. That on April 6, 2018, an Ex Parte Custody Order was signed by The Honorable Kevin Eddinger (filed on April 7, 2018), which placed the immediate temporary ex parte legal and physical care, custody, and control of the minor child with [Father] and set the matter on for hearing on April 18, 2017.

34. That on April 18, 2017, [Mother] filed an Answer and Counterclaim for custody and child support.

35. That upon the call of the matter on April 18, 2017, for hearing on the Ex Parte Custody Order, the parties and their attorneys stipulated that the minor child could testify in chambers before the presiding judge, The Honorable Marshall Bickett.

36. That while testifying in chambers, with both attorneys present, the minor child disclosed that his mother, the [Mother] in this action, had touched him inappropriately.

37. That following the minor child's testimony, the parties and their attorneys signed a Temporary Memorandum of Judgment/Order which slated that [Father] shall

have full legal and physical care, custody, and control of the minor child [Henry] and that given the circumstances of this case referral to custody mediation is not appropriate. That the Temporary Memorandum of Judgment/Order was filed on April 18, 2017 (formal Order filed May 17, 2017).

38. That the issues raised by the minor child's testimony were reported to law enforcement and to the Rowan County Department of Social Services.

39. That law enforcement conducted an investigation, and the Rowan County Department of Social Services conducted an investigation.

40. That in conjunction with the Rowan County Department of Social Services' investigation, the minor child was referred to the Terrie Hess House Child Advocacy Center where he gave an interview and it was recommended that the minor child talk to a therapist to assist him in dealing with the [Mother] inappropriately touching him. That the basis for the referral to the therapist was that the minor child's mother had touched his penis.

. . . .

43. That the Rowan County Department of Social Services conducted an investigation on the reported touching of the minor child. The case was not substantiated. A later complaint was lodged against [Mother] which was also not substantiated. [Mother's] Exhibits 1 and 2 are incorporated by reference.[2]

44. That no juvenile neglect or abuse proceeding was initiated by the Rowan County Department of Social Services against the [Mother] on behalf of the minor child.

45. That following a complaint, the Rockwell Police Department conducted an investigation on the reported touching of the minor child. [Mother] made a voluntary statement to the police. The Rowan

2. These exhibits are letters from DSS stating, "the case was unsubstantiated."

County District Attorney's Office was contacted and declined prosecution.

46. That no 50B was filed by [Father] on behalf of the minor child against [Mother].

47. That the parties were experiencing marital disharmony during the relevant time periods related to the reported touching of the minor child, including from Thanksgiving of 2016 until the hearing on April 18, 2017.

48. That the minor child was a "very sick baby" requiring the use of a nebulizer "50% to 60% of the time." The minor child began sleeping with [Mother] as an infant.

49. That prior to the parties' separation [Father] and [Mother] slept in separate bedrooms, and [Mother] had the minor child sleep in the same bed with her regularly and frequently. [Mother] referred to this time as their "cuddle time," "snuggles," and "snuggle time."

50. That [Father] and [Mother] argued over the minor child sleeping in the same bed with [Mother] as [Father] objected to that arrangement.

51. That [Mother] admitted in her testimony that she touched the minor child's penis when he was in the bed with her.

52. That on the night of the touching, the minor child was wearing sweatpants.

53. That the [Mother] explained in her testimony that while touching the minor child's penis she thought she was petting a cat or a dog.

54. That the [Mother] told a neighbor, Mona Bisnette, that She had been accused of improperly touching the minor child; that she was mortified; and that she thought she was touching a dog.

55. That following the incident of [Mother] touching the minor child's penis, the minor child refused to sleep in the same bed with [Mother]. [Mother] started yelling at the minor child and punishing the minor child by taking away his play station and other items. That [Mother] acknowledged that she was yelling at

> the minor child "a lot the last week before the date of separation."
>
> 56. That prior to the parties' separation [Mother] made inappropriate comments to [Father] about the minor child's genital size.

The order concluded Mother "is not a fit and proper person to have custody of the minor child" and granted "permanent full legal and physical care, custody, and control" to Father. The order directs that Mother "shall not have visitation with the minor child at this time." The order also does not recommend or direct Mother to engage in counseling or order any other method by which she may be able to resume some form of visitation or communication with Henry. Mother timely appealed.[3]

II. Required Findings

Mother argues the "trial court's conclusion of law that Ms. Sherrill is not a fit and proper person to have custody or any visitation with the minor child is not supported by competent evidence or findings of fact."

A. Standard of Review

> The standard of review "when the trial court sits without a jury is 'whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " "In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings . . . . Unchallenged findings of fact are binding on appeal." "Whether [the trial court's] findings of fact support [its] conclusions of law is reviewable de novo." " 'If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order.' "
>
> In addition, "[i]t is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody."

Burger v. Smith, 243 N.C. App. 233, 236, 776 S.E.2d 886, 888-89 (2015) (alterations in original) (citations omitted).

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3. Initially, Father did not have appellate counsel and was referred to the North Carolina Appellate Pro Bono Program.

B. Findings of Fact

Most of the trial court's findings of fact are not challenged on appeal and thus are binding on this Court. *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011) ("Unchallenged findings of fact are binding on appeal." (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991))). Mother challenges portions of Findings of Fact 51, 53, 55, and 56:

> 51. That [Mother] admitted in her testimony that she touched the minor child's penis when he was in the bed with her.
>
> . . . .
>
> 53. That the [Mother] explained in her testimony that while touching the minor child's penis she thought she was petting a cat or a dog.
>
> . . . .
>
> 55. That following the incident of [Mother] touching the minor child's penis, the minor child refused to sleep in the same bed with [Mother]. [Mother] started yelling at the minor child and punishing the minor child by taking away his play station and other items. That [Mother] acknowledged that she was yelling at the minor child "a lot the last week before the date of separation."
>
> 56. That prior to the parties' separation [Mother] made inappropriate comments to [Father] about the minor child's genital size.

C. Sufficiency of the Evidence to Support Finding No. 51

Mother argues the trial court's conclusions are not supported by the findings of fact. She also challenges the trial court's findings of fact to the extent that they find she touched Henry's penis. Her argument is based primarily upon Finding No. 51, "That [*Mother*] *admitted in her testimony* that she touched the minor child's penis when he was in the bed with her." (Emphasis added.) Her argument also encompasses portions of Finding No. 53 ("[Mother] explained in her testimony that while touching the minor child's penis") and Finding No. 55 ("following the incident of the [Mother] touching the minor child's penis"). We will first address the findings of fact.

Mother argues the only evidence of any inappropriate touching was her own testimony. To the extent Finding No. 51 could be interpreted as a finding of a direct, unclothed touching, or even an intentional touching, Mother is correct that *her testimony* does not support such a finding, although we will address Father's argument regarding Henry's testimony below. In her testimony, Mother described the incident as an accidental touching on top of a blanket and outside of the child's pants. Finding No. 52 seems to accept Mother's claim that any touching was outside the clothing: "That on the night of the· touching; the minor child was wearing sweatpants."

Despite Finding No. 52, Mother argues the trial court's Finding No. 51 could be interpreted as a finding she had *directly* and intentionally touched the child's penis. She argues this difference is "incredibly significant," and she is correct. The first, an unintentional touching outside of the clothing not motivated by sexual intent, is neither child abuse nor a crime. The second—an intentional touching underneath the clothing or an intentional touching with sexual intent—could easily be child abuse and potentially a felony. And if the incident was accidental, one accidental touch would not justify granting Father sole legal and physical custody and entirely cutting off all visitation between Mother and Henry.

The other evidence in our record is either consistent with Mother's testimony or does not address how the touching incident occurred. Kim Lance, a licensed marriage and family therapist, testified regarding her therapy with Henry, which started on 11 May 2017, upon referral from Terrie Hess House. She testified the "basis of that referral" was "[t]hat his mother had touched his penis," and her therapy was focused upon that particular issue. Ms. Lance did not testify regarding what Henry had disclosed to her in their fourteen therapy sessions, based upon Mother's objection to this testimony. Father's counsel asked Ms. Lance about what Henry had said, resulting in these objections and rulings:

> Q. Ms. Lance, in the 14 times that you've met with [Henry], has he discussed with you what he has said occurred to him–
>
> MR. DAVIS: Objection.
>
> Q. -- or happened to him?
>
> THE COURT: She's not an expert. Can't use it as the basis of her foundation. Okay.
>
> MS. SMITH: Be corroborative of his testimony, Your Honor.

> . . .
>
> MR. DAVIS: We don't know that.
>
> THE COURT: -- his -- his testimony by the stipulation of the parties was confidential and not reduced as findings.
>
> MS. SMITH: Thank you.
>
> THE COURT: Objection sustained. . . . I -- I've considered it as testimony. I know it's testimony. *Y'all were there when I heard it and -- and whether you know from the record and your prep of this witness about whether that testimony that we heard, that confidential testimony that we heard, is consistent with her experience may be grounds for you to question, but you're not going -- it would be improper for you to have her tell us what -- what [Henry] said at this point as corroboration at least.*[4]

(Emphasis added.)

Ms. Lance testified about her therapy with Henry and that he had been "specific in his conversations . . . related to his mom[.]" Ms. Lance provided her therapy records to DSS on 8 August 2017. The therapy records were not presented as evidence at trial, even for *in camera* review.

Mona Bisnette, a neighbor who lived next door to the parties since 2002, also testified. Her grandson played with Henry so she saw him frequently and she was "on a friendly basis" with Mother. Mother talked to her "several times" regarding the parties' marital difficulties and their separation. She testified that Mother contacted her about the allegations against her around April of 2017. Mother told Ms. Bisnette

> [t]hat she had been accused of inappropriate touching with [Henry] and that they were -- [Henry] and her were in her room in her bed and that she said she had accidentally touched him and that she was mortified and he laughed.
>
> Q. That's what she told you?
>
> A. Yes, ma'am.

---

4. Since trial counsel for both parties were in chambers during the child's testimony, they would have been aware if the child testified to a direct touching or some other action which may constitute sexual abuse. But the trial court forbade trial counsel from telling anyone what the child said, and both parties have different attorneys on appeal, so we assume that they also do not know what the child said.

> Q. What did you ask her about that or say in response to that?
>
> A. I just -- we just briefly just discussed it. . . . She didn't go into great detail and I didn't ask to be told the details of it.
>
> Q. Did she say to you anything about what she thought she was doing or touching?
>
> A. That she was touching one of their cats.
>
> Q. Okay. Did she say specifically she thought she was petting a cat?
>
> A. I believe it was a dog.
>
> Q. You thought dog? Okay. Did she -- I don't want to put words in your mouth. Did she say that, did she say petting a dog? Or what did she say?
>
> A. She thought she was touching the dog.

Thus, Mother's argument that the only evidence of any inappropriate touching was her own testimony is essentially correct, although again, this argument does not take the child's testimony in chambers into account. But in Finding No. 51, to the extent the trial court found Mother "admitted in her testimony" any sort of inappropriate intentional touching, the finding is not supported by the evidence. Mother did not "admit" to any inappropriate, intentional, or sexually motivated touching. Ms. Lance did not testify regarding any details of the incident, and Ms. Bisnette's testimony about Mother's prior statements to her was consistent with Mother's trial testimony that the touching was accidental and outside of the child's clothing. Ms. Lance had provided her therapy records to DSS during its investigations, and neither DSS nor law enforcement found sufficient evidence to pursue legal action regarding child abuse or a criminal prosecution. Although we recognize the legal standards and burden of proof are different for an adjudication of abuse and a criminal prosecution than a custody determination, in this case, we are dealing with one discrete incident in November 2016. The incident was either an accidental touch or sexual abuse, and Mother "admitted" an accidental touching outside of the clothing but not an intentional or improper touching. Thus, Finding No. 51, as well as the portions of Findings No. 53 and 55 which seem to be based upon No. 51, are not supported by the evidence.

D. Sufficiency of Evidence to Support Finding 56

Mother also challenges Finding No. 56, that "[Mother] made inappropriate comments to [Father] about the minor child's genital size" for similar reasons. This finding addresses a discussion between Mother and Father, not the child's testimony of the touching incident. Neither party contends the child's testimony is relevant to this finding. The evidence supports a finding that Mother commented regarding the child's development, although it is not apparent why the comment was "inappropriate." Father testified:

> We were standing in the hallway of the house and she came out and told me that [Henry] had hair down there on his private parts and how big his penis was.
>
> Q. She said that specifically?
>
> A. Yes, ma'am.
>
> Q. Can you tell me approximately when that was before you separated?
>
> A. That was right in January [of 2017].
>
> . . . .
>
> Q. Okay. What, if anything, prompted that statement? I mean, were y'all talking about anything like that?
>
> A. No, ma'am.
>
> Q. What did you say back to her?
>
> A. I asked her what she was doing looking at [Henry's] private parts and that I thought that was uncalled for. And–
>
> Q. What did she –
>
> A. – I was in shock. I mean, I just – it just sort of blew my mind and I was like – I couldn't believe it that she just came out and said that.

Mother also testified about this comment. She testified at length regarding interviews she gave to both DSS and law enforcement.

> Q: Did you acknowledge to the detective in your investigation that you did comment to your husband about your son's, specifically, his genital area?
>
> A. I did. I was in shock. I did not know that he had become a man and that he had reached puberty.

> Q. What did you say to [Father] and when was that?
>
> A. I -- I don't really recall what time frame it was. I just know that he was coming out of my bathroom. They must've been getting ready for baseball, because they were both taking showers at the same time. He dropped his towel by accident. He got embarrassed. He left. I looked away. And I made a comment holy cow, I didn't know that my son is a little man now. I had no idea. And that he had reached puberty.

Based on the trial court's Finding No. 56 and the evidence from both parties, it is not clear what the trial court meant by characterizing Mother's comments as "inappropriate." Parents sometimes discuss the physical development of their children, with no sexual intent or connotation. Based upon the findings and all of the evidence, Mother made these comments only to Father and not to the child or in the child's presence. And although these comments occurred before the parties' separation and Father knew this comment when he filed the complaint, Father made no allegations of sexual misconduct in his complaint for child custody or in his motion for emergency ex parte temporary custody. The only basis for his emergency motion was his concern that Mother may take Henry and Father "will never see the minor child again." The trial court's Finding No. 56 is supported by the evidence to the extent that Mother commented regarding the child's development. Since the trial court determines the weight and credibility of the evidence, *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994), the trial court has the discretion to characterize the comment as "inappropriate," but this finding also fails to resolve the crucial factual issue as to Mother's alleged sexual misconduct.

E. Waiver of Findings Regarding Child's Testimony

Father's primary response to Mother's arguments regarding the findings of fact is that the parties waived findings of fact and agreed for the trial court to speak to Henry in chambers and off the record. Father is correct that Mother waived the right to have the child testify in open court and to have a record of the child's statements to the trial court. Father is also correct that the parties agreed the trial court would not tell the parties what Henry said and would not make detailed evidentiary findings regarding his in-chambers testimony. But regardless of Henry's testimony, Finding No. 51 specifically addresses *Mother's testimony*, not other evidence presented in or out of the courtroom. No matter what the child disclosed in chambers, the only finding of fact regarding the

touching is specifically based upon *Mother's testimony*, and this finding is not supported by her testimony.

Had the trial court made a clear ultimate finding characterizing the touching as an intentional inappropriate touching, Father is correct that Mother would be unable to argue the finding was not supported by the evidence, since she agreed for Henry to testify in chambers with no record of his testimony. *Kleoudis v. Kleoudis*, ___ N.C. App. ___, ___, 843 S.E.2d 277, 283 (2020) ("An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts." (quoting *Quick v. Quick*, 305 N.C. 446, 451-52, 290 S.E.2d 653, 657-58 (1982))). This sort of ultimate finding need not identify the particular evidence supporting it. *Id*. But the trial court did not make any ultimate finding which resolves the issue, and we must consider whether the findings support the trial court's conclusions of law. Mother did not waive findings of fact entirely and she did not waive having conclusions of law based upon the trial court's findings.

Father argues Mother waived not just the right to have Henry's testimony on the record, but also that she waived findings of fact. The trial court's order notes the agreement as follows:

> AND IT APPEARING to the Court that at the call of this matter for trial the parties and their attorneys stipulated that the minor child at issue could testify in chambers and that his testimony would be considered by the Court and his credibility weighed by the Court as part of the Court's final decision and Order with the parties' stipulation that specific findings of fact were waived and confidential[.]

At the beginning of the trial, after some discussion of how to proceed with Henry's testimony, the trial court summarized the parties' agreement to the satisfaction of both parties:

> All right. So the features, as I understand them, of your agreement are I'll be back there. The attorneys will be back there. Your son will answer questions asked by your attorneys. He'll have a chance to volunteer anything they don't ask. Anything he tells me, I'll consider, I'll weigh it along with all the other evidence that will be received after that. He doesn't need to decide what's going to happen. That's my job.
>
> But I have to assess what weight to give his testimony, but here's the key: what he says to me is not going

> to be in any final order. It's just to be considered by me, because it's -- what he says is going to be confidential. And so what he says can't be relayed to you by the attorneys, by your attorneys. So you can ask them. They can't tell you. And they're officers of the Court and they're going to follow that rule.
>
> Now, your son, if he wants to tell you, that's -- that's up to him. I -- I - I can't put a gag order on him. But it would be inappropriate for you to ask him. All right?
>
> So the confidentiality, waiving specific written findings of fact, featuring that I will consider his comments and what weight to give his testimony, along with other relevant testimony yet to be offered. Is that your agreement?
>
> MS. SHERRILL: Yes.
>
> MR. SHERRILL: Yes.

Father argues that because Mother agreed for Henry's testimony to be unrecorded and to waive findings of fact regarding his testimony, Mother has waived appellate review of the trial court's findings or their sufficiency to support the trial court's conclusions of law, or that Mother invited any error by the trial court. He contends that Mother's

> argument that "at trial, the only first-hand testimony given about the events of Saturday morning 26 November 2016 came from Defendant Mother, Linda Ann Sherrill", Appellant's Brief, p. 16, is not an accurate representation of the details of the trial. While the court followed the stipulation of the parties and did not include a description or evaluation of the unrecorded testimony of the minor in chambers, this Court must presume that the child gave testimony about this incident, including the likelihood that the child gave testimony that conflicted sharply with the self-serving testimony of Mrs. Sherrill. Findings of fact by the trial court are presumed to be supported by sufficient evidence, unless the appellant can show the absence of supporting evidence. *See Clark v. Clark*, 23 N.C. App. 589, 209 S.E.2d 545 (1974) (courts will bind the parties to their agreements).

We first note that the trial court's description of the parties' agreement, which both parties indicated was correct, did not entirely waive findings of fact to support the custody determination, as did the parties

in *Clark v. Clark*, 23 N.C. App. 589, 209 S.E.2d 545 (1974). They also did not agree for the trial court to make conclusions of law unsupported by any findings of fact. They agreed to confidentiality for what Henry actually said in chambers. Specifically, the trial court summarized the agreement: "but here's the key: *what he says to me is not going to be in any final order*." (Emphasis added.)

Findings of fact are not supposed to be recitations of testimony, nor must orders include detailed evidentiary findings. *See Schmeltzle v. Schmeltzle*, 147 N.C. App. 127, 130, 555 S.E.2d 326, 328 (2001) ("There are two kinds of facts, evidentiary facts and ultimate facts. Evidentiary facts are 'those subsidiary facts required to prove the ultimate facts.' Ultimate facts are "the final facts required to establish the plaintiff's cause of action or the defendant's defense . . . ." (alteration in original) (citations omitted)). The trial court is required only to make findings of ultimate fact sufficient to support its conclusions of law and sufficient to allow appellate review. N.C. Gen. Stat. § 1A-1, Rule 52(a)(1). In *In re Anderson*, this Court reversed and remanded the trial court's order because its findings were recitations of evidence which did not resolve the issues of fact:

> The trial court's findings of fact, in large part, amount to mere recitations of allegations and provide little support for the conclusions of law.
>
> > In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.
>
> N.C. Gen. Stat. § 1A–1, Rule 52(a)(1) (2001). Rule 52(a) requires three separate and distinct acts by the trial court: (1) find the facts specially; (2) state separately the conclusions of law resulting from the facts so found; and (3) direct the entry of the appropriate judgment. Thus, the trial court's factual findings must be more than a recitation of allegations. They must be the "specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts."
>
> > In summary, while Rule 52(a) does not require a recitation of the evidentiary and subsidiary

> facts required to prove the ultimate facts, it does require specific findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

151 N.C. App. 94, 96-97, 564 S.E.2d 599, 601-02 (2002) (alteration in original) (citations omitted).

The parties' agreement that the trial court need not make specific findings of fact regarding what the child said does not eliminate the need for ultimate findings, as findings of fact should not be recitations of testimony. *See Appalachian Poster Advert. Co. v. Harrington*, 89 N.C. App. 476, 479, 366 S.E.2d 705, 707 (1988) (Mere recitations "do not reflect the 'processes of logical reasoning' required by G.S. 1A–1, Rule 52(a)(1)."). "The findings should resolve the material disputed issues, or if the trial court does not find that there was sufficient credible evidence to resolve an issue, should so state." *Carpenter v. Carpenter*, 225 N.C. App. 269, 279, 737 S.E.2d 783, 790 (2013) (citing *Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986)).

Most of the trial court's other findings, particularly No. 53 and 54, also seem consistent with Mother's testimony, although we also note that No. 53 is a recitation of testimony. *In re M.R.D.C.*, 166 N.C. App. 693, 699, 603 S.E.2d 890, 894 (2004) ("Recitations of the testimony of each witness do not constitute findings of fact . . . ." (quoting *Moore v. Moore*, 160 N.C. App. 569, 571-72, 587 S.E.2d 74, 75 (2003))). As a recitation, it does not resolve the factual issue presented to the trial court. *Id*. In particular, Finding 53 is quite important:

> 53. That the [Mother] explained in her testimony that while touching the minor child's penis she thought she was petting a cat or a dog.

This finding is supported by the evidence, since Mother did explain the incident this way. But we cannot tell if the trial court accepted Mother's explanation as credible, or if the trial court determined this was an excuse for Mother's inappropriate actions and was not credible. If Mother thought she was petting a cat or dog—and this finding seems to indicate she did—Mother's touching was an unfortunate accident.[5]

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5. Mother testified that the family had cats and dogs, and both sometimes slept with her and Henry.

If the trial court believed Mother was lying about how the touching occurred and her intent, this would support a finding of inappropriate sexual conduct.

III. Conclusions of Law

Mother argues that the findings of fact do not support the trial court's conclusions of law. The trial court made these conclusions of law:

> 4. That [Mother] is not a fit and proper person to have custody of the minor child, and it is not in the best interests of the minor child for his custody to be placed with [Mother].
>
> 5. That [Mother] is not a fit and proper person to have visitation with the minor child, and it is not in the best interests of the minor child to have visitation with [Mother].

We have already determined that Finding No. 51 and portions of Findings 53 and 55 were not supported by the evidence, so we will disregard those findings. As noted above, the remaining findings do not resolve the crucial factual dispute regarding the nature of the touching-accidental or intentional and sexually inappropriate.

The other unchallenged findings of fact regarding Mother are mostly positive. The uncontested findings show that Mother was Henry's primary caretaker for most of his life and was active in supporting his education and sports activities. She had provided for him financially both before and after the separation. She attended counseling as recommended to address the issues arising from the alleged touching. She has a suitable home. There are no other findings of fact which would support a conclusion of law that Mother is not a fit and proper person to have custody or at least some form of visitation with the child.

The trial court made findings of fact regarding both parties' homes, health, and employment as well as the child's education, health, and extracurricular activities. Although some of the trial court's findings regarding Father were positive, many of the trial court's findings regarding father are negative or, at least, raise concerns. For example, he had serious anger issues which resulted in him yelling at Henry's middle school basketball coach and subsequently getting barred from all the home and away basketball games for the rest of the season. Father also suffers from chronic nerve pain and "takes a number of narcotic, muscle relaxer, analgesic, pain, and mental health medications." But considering all of the findings, there is no apparent reason Mother would be

denied any sort of visitation with Henry based upon the single alleged touching in November 2016. This is not a case with evidence of a pattern of sexual abuse or misconduct by Mother. Since the trial court's findings did not clearly identify why it found Mother unfit even to have supervised visitation or limited contact with the child, the order left her with no way to correct whatever error caused her to lose custody.

Since the trial court's findings cannot support its conclusion that Mother is unfit to have custody or visitation with Henry, the findings also cannot support the trial court's conclusion that visitation with Henry is not in his best interest. In addition, the trial court did not include any provisions requiring Mother to attend therapy or note any actions Mother may take to be able to resume visitation. Since the order does not determine exactly what Mother did wrong, it gives her no direction on what she may need to do resume visitation with Henry. Because we have concluded the trial court's findings do not support its conclusions that Mother is not a fit and proper person to have custody or visitation with Henry and that it is not in his best interest for mother to have custody or visitation, we must reverse the trial court's order and remand for further proceedings.

IV. Conclusion

Because the trial court failed to make adequate findings of fact to support its conclusions of law that Mother is not a fit and proper person to have custody or visitation of Henry and that custody and visitation with Mother are not in his best interest, we reverse and remand for a new order with additional findings resolving the crucial disputes of fact. On remand, the trial court may, but is not required to, rely upon the existing record, including its recollection of Henry's testimony in chambers and, in accord with the parties' agreement, should not make detailed evidentiary findings regarding his testimony, but the trial court must clearly make ultimate findings of fact to support the conclusions of law. In its discretion, the trial court may also receive additional evidence on remand.

REVERSED AND REMANDED.

Judges MURPHY and BROOK concur.

STATE OF N.C. EX REL. N.C. DEP'T OF COM., DIV. OF EMP. SEC. v. ACES UP EXPO SOLS., LLC

[275 N.C. App. 170 (2020)]

STATE OF NORTH CAROLINA EX REL. NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY, APPELLEE
v.
ACES UP EXPO SOLUTIONS, LLC, APPELLANT

No. COA20-185

Filed 15 December 2020

1. Employer and Employee—unemployment taxes—assessment—findings of fact

In its decision affirming a tax assessment issued to appellant-business for unemployment taxes owed on its employee payroll, the N.C. Department of Commerce Board of Review's findings of fact were supported by competent evidence where appellant challenged the findings regarding appellant's control of the manner of work and ability to discharge workers; workers' use of independent knowledge, skill, or licenses; workers being in appellant's regular employ; appellant's provision of tools and equipment; and workers' pay. Although appellant may have established that there was conflicting evidence on the findings, it was the Board's duty to resolve those conflicts.

2. Employer and Employee—unemployment taxes—assessment—conclusions of law—Hayes factors

In its decision affirming a tax assessment issued to appellant-business for unemployment taxes owed on its employee payroll, the N.C. Department of Commerce Board of Review's conclusions of law were supported by the findings of fact and a proper application of *Hayes v. Bd. of Trustees of Elon College*, 224 N.C. 11 (1944), and the Board did not err in affirming the assessment. The Board properly applied *Hayes* in determining that the workers were not licensed and had no specialized skills; they worked part-time; appellant instructed the time, place, and person to which they would report; and they received training as to how to perform the work.

Appeal by Appellant from an Order entered 9 October 2019 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 October 2020.

Timothy M. Melton, for appellee North Carolina Department of Commerce, Division of Employment Security.

The Law Office of Mark N. Kerkhoff, PLLC, by Mark N. Kerkhoff, for appellant.

HAMPSON, Judge.

Factual and Procedural Background

Aces Up Expo Solutions, LLC (Appellant) appeals from an Order affirming the North Carolina Department of Commerce Board of Review's decision concluding the Department's Employment Security Division (the Division) correctly issued a Tax Assessment and Demand for Payment to Appellant for unemployment taxes owed on Appellant's employee payroll. The Record before us reflects the following:

Appellant is a business, owned by Dennis Scott Foshie (Foshie), that provides labor crews to construct and take down trade show booths and displays in North Carolina and other states. The Division is responsible for administering North Carolina's Employment Security Act, codified in Chapter 96 of the North Carolina General Statutes, pursuant to state and federal law. In 2014, the Division received a complaint that Appellant had misclassified its workers as independent contractors and not as employees. As such, Appellant was allegedly not paying unemployment security taxes that fund the state's unemployment benefits programs. Based on this complaint, the Division began investigating Appellant's account. The Division's investigation concluded Appellant was an employer liable for unemployment insurance taxes. Accordingly, the Division sent Appellant invoices for each quarter of the years 2010 through 2014.

On 29 November 2016, the Division issued an Unemployment Tax Assessment and Demand for Payment (Tax Assessment) to Appellant for employer contributions, interest, and penalties for all of 2015 and the first three quarters of 2016. On 28 December 2016, Appellant filed a protest of the Tax Assessment asserting its workers were independent contractors and not employees covered under the Employment Security Act. In response to the protest, the Division conducted a review to determine if it had correctly issued the Tax Assessment. That review concluded the Division had correctly issued the Tax Assessment to Appellant because Appellant's workers were employees and not independent contractors.

Appellant appealed the Division's determination to the North Carolina Department of Commerce Board of Review (the Board). The Board held a telephonic hearing pursuant to N.C. Gen. Stat. § 96-4(q). Present at this hearing were: Sheena Cobrand, the Board's hearing

officer; Appellant's attorney; Foshie; the Division attorney; Division investigator Lisa Ramsey; Division witness Bruce Milazzo, owner of a business in competition with Appellant; and Division witness Brandon Page, an insurance agent. Both sides presented evidence including witness testimony, affidavits, and other exhibits.

On 28 May 2019, the Board issued a Tax Opinion affirming the Division's Tax Assessment issued to Appellant. Included in the Board's Tax Opinion were the following relevant Findings of Fact:

> 2. During the course of the underground economy investigation, Lyles provided Foshie with an Employer's Statement Questionnaire ("ESQ") to be completed on behalf of the employer.
>
> 3. In the ESQ, Foshie acknowledged: (1) that the nature of the services rendered by his business include laying carpet, setting up tables, preparing booths for trade shows, general tools, and stages; (2) that workers do not advertise their services; (3) that workers do not have federal employer identification numbers; (4) that licenses or permits for this type of work is not applicable; (5) that he provided on-the-job training for some workers, including teaching them the tools of the trade; (6) that payment is set based on a 10-hour workday; (7) that workers are reimbursed for hotel expenses; (8) that he tells the workers what is to be done; (9) that he tells the workers how to do the work; (10) that he can discharge workers for doing the work another way; (11) that workers don't specifically report to anyone while work is being done, but talks to him if problems arise; (12) that there are no contracts with workers; and (13) that he carries workers' compensation insurance on the workers, and that the workers do not carry insurance. Foshie signed the ESQ on October 16, 2014, acknowledging that his responses were true, accurate, and complete.
>
> . . . .
>
> 9. RTM Lisa Ramsey was assigned to review and determine whether the Tax Assessment was properly issued. Ramsey provided another ESQ to Foshie to be completed on behalf of the employer. On May 4, 2017, Attorney Kerkhoff submitted responses to the ESQ that Ramsey

provided to Foshie. Foshie acknowledged that his typed name on the document signifies his signature, and that the responses provided in this ESQ were also true, accurate, and complete.

10. Upon completing her protest assignment, Ramsey submitted written findings. In her findings, Ramsey concluded that the workers listed in the employer's 2015 and 2016 quarterly tax and wage reports were employees of the employer, and not independent contractors. Ramsey specifically noted discrepancies in the two ESQ responses given by Foshie.

. . . .

12. The employer does not maintain a brick and mortar building or office specifically for its business. Some crew members are residents of North Carolina, while others reside in other states. Crew members travel directly from their homes to the project trade show job sites. Job sites include fairgrounds, convention centers, and racetracks.

13. The process of providing a crew for a specific project is as follows: The decorators/contractors contact the employer with requests for specific individuals and/or a specific number of workers to provide trade show labor. The employer contacts the requested individuals and other workers to provide the labor needed for specific trade shows.

14. Crew members perform work in four main categories, including professional riggers/commercial signage crews operating aerial platform lifts and scissor lifts; forklift operators; construction/deconstruction crews; and tradeshow design/decorator outfit crews.

15. Foshie contacts workers to meet a decorator's stated needs and directs the workers to the specific location of the work to be completed for the trade show. He also instructs them on when to report for work, as well as to whom they should report. Workers are instructed to report to the on-site crew leader, and to follow instructions provided by the crew leader or decorator. If problems arise, workers are directed to contact Foshie for solutions.

16. Foshie travels to trade shows after dispatching his workers to ensure that displays are set up correctly and that the work performed by his workers is satisfactory to the customer decorator. Foshie also had the right to discharge workers. The employer's business operation and procedures have remained the same since employer's inception.

17. The employer's business relies on its workers to continue operating, and would have to shut down if the workers were treated as employees. Most of the employer's workers perform work as part of a constructing and deconstructing crew, or design/decorator outfit crew, and did not require licenses, certificates, or specialized training.

18. Workers cannot enter facilities to perform their job duties without insurance coverage provided by the employer.

19. The employer signed and submitted applications for insurance coverage for its business and workers. The employer's insurance policies cover the employer's workers for on-the-job injuries.

20. The employer carries general liability and workers' compensation insurance on all its workers. The employer carried general liability insurance policies during calendar years 2015, 2016, and 2017. The employer also carried workers' compensation insurance for its workers during calendar years 2015, 2016, and 2017.

21. The insurance policy issued to the employer from State Auto Insurance Companies under policy number BOP 2664234 02 for the period January 8, 2014 to January 8, 2015 provides insurance coverage for some of the employer's equipment and tools.

22. The insurance policy issued to the employer from Erie Insurance under policy number Q25 0820945 CH for the period January 8, 2014 to January 8, 2015 provided insurance coverage for four full-time employees. Coverage was based on information provided by Foshie to his agent.

. . . .

24. The employer's commercial general liability application with Erie Insurance for the policy effective date of June 15, 2015 specifically states that the employer had no subcontractors, and does not act as a general contractor.

25. The Employment Practices Liability coverage issued to the employer from Liberty Mutual Insurance under policy number BKS (17) 57 37 95 97 for the period July 7, 2016 to July 7, 2017 sets a premium and provides coverage for eight employees.

26. Prior to issuing the workers' compensation policy, Page explained to the employer that workers' compensation insurance was not required on two or less employees.

. . . .

28. Foshie determines the hourly rate of compensation for the workers. Workers are paid for overtime hours. The employer also maintains payroll for all its workers. The employer also pays for the workers' travel and lodging expenses when overnight stays are necessary.

29. With the exception of one company, Wide Ark Services, Inc. ("Wide Ark") , the employer's workers are individuals, and do not have their own businesses. One of the employer's workers was homeless and sleeping in her car while when she performed work for the employer. One worker was paid $12.00 per hour. Another worker performed additional services for the employer.

. . . .

31. The employer's other workers, who are all individuals, do not have any written contracts with the employer. Some of those workers perform the same type of work for other companies in the same line of work as the employer. The workers do not submit bids for jobs to the employer. The workers do not submit written invoices for their services to the employer. The workers are paid directly by the employer, and payment is made in the individuals' names. Requests for raises in the amount of hourly pay for a worker must be made to Foshie. Foshie can fire workers.

> 32. The employers' workers do not carry liability insurance or workers' compensation insurance. Foshie has never asked the workers if they had their own businesses. He has also never requested certificates of insurance from the workers. The individual workers do not advertise for their services, or have federal employer identification numbers.

The Board annotated its Findings with sixty-seven footnotes referencing the hearing transcripts, affidavits, exhibits, and other evidence adduced at the hearing.

The Board's Opinion also included a section setting out the applicable law. This section explained that N.C. Gen. Stat. § 96-1(b)(10) defers to federal law which defines "employee" as: "any individual who, under the common law rules applicable in determining the employer-employee relationship, has the status of an employee . . . ."[1] Further, the Board noted Sections 96-1(11)-(12) defer to the federal definition of employer as: "any person who during a calendar year . . . paid wages of $1,500 or more, or . . . employed at least one individual . . . ."[2] Because Appellant's appeal centered around the Division's conclusion Appellant's workers were "employees," the Board saw it necessary to examine North Carolina's common law rules used to determine if a worker is an independent contractor.

The Board's Tax Opinion relied on *Hayes v. Bd. of Trustees of Elon College*, which sets out the common law factors for determining whether a worker is an independent contractor. 224 N.C. 11, 29 S.E.2d 137 (1944). Citing *Hayes*, the Board identified those factors including that an independent contractor:

> (a) Is engaged in an independent business, calling or occupation;
> (b) Is to have the independent use of his special skill, knowledge or training in the execution of the work;
> (c) Is doing a specified piece of work at a fixed price or a lump sum upon a quantitative basis;
> (d) Is not subject to discharge because he adopts one method of work rather than another;
> (e) Is not in the regular employ of the other contracting party;

1. 26 U.S.C. § 3121(d).

2. 26 U.S.C. § 3306(a).

(f) Is free to use such assistants as he may think proper;

(g) Has full control over such assistants;

(h) Selects his own time.

Also citing *Hayes*, the Board noted, "the employer's retention of the right to control and direct the manner in which the details of the work are to be executed and what the laborers will do as the work progresses is decisive."

Applying the *Hayes* factors, the Board observed from the evidence: Appellant's "workers were not engaged in independent businesses, callings or occupations . . . performed part-time work for the employer[,]" and that no profit or loss could be realized by the workers; the workers could complete their tasks after general direction and without "specialized skills" requiring "formal training[;]" workers did not "do a specified piece of work at a fixed price . . . [Appellant] set the pay rate and signed the relevant pay checks"—workers were paid on an hourly basis and did not bill Appellant; workers were subject to discharge for adopting one method of work over another, but it was not necessary for Foshie to be present because of the nature of the work; Foshie established and communicated expectations to the workers and required them to report to specific places, at specific times, to specific people; workers did not use assistants and had no supervisory authority over any other worker; and, workers could not "select [their own] work hours"—Appellant required certain "commitment minimums" and workers were paid overtime. Accordingly, the Board affirmed the Division's Tax Assessment and found Appellant was liable for unemployment insurance contributions.

On 12 June 2019, Appellant filed exceptions to the Tax Opinion. The Board overruled Appellant's exceptions on 19 June 2019. Appellant petitioned for judicial review in Mecklenburg County Superior Court on 27 June 2019. The Mecklenburg County Superior Court heard Appellant's case on 7 October 2019. After hearing "the arguments presented, review[ing] the applicable case and statutory law, examin[ing] the record on appeal, and review[ing] the evidence[,]" the Superior Court filed its Order Affirming Administrative Decision (Order) on 9 October 2019. In its Order, the Superior Court concluded the Board was responsible for "determining the weight and sufficiency of the evidence . . . and resolving conflicting and circumstantial evidence." The Superior Court found there was "competent evidence in the record to support the Board of Review's findings of fact[.]". Moreover, the Superior Court concluded: "It appears from the record that the Board of Review considered and applied the common law factors set forth in *Hayes v. Bd. of Trustees of*

Elon College, . . . in determining that Appellant's workers were employees . . . ." As such, the Superior Court concluded "the Board of Review correctly applied the common law factors to its findings of fact in concluding that Appellant's workers were employees of Appellant." Finally, the Superior Court determined the Board considered, interpreted, and correctly applied North Carolina's Employment Security Law in this case. Accordingly, the Superior Court affirmed the Board's Tax Opinion. The Superior Court's 9 October 2019 Order was not served on Appellant until 18 November 2019. Thus, Appellant timely filed its written Notice of Appeal to this Court on 16 December 2019.

Issues

The dispositive issues in this case are whether the Superior Court properly concluded: (I) the Board's Findings of Fact were supported by competent evidence; and (II) the Board properly applied the law in determining Appellant was an employer liable for unemployment taxes under North Carolina's Employment Security Law.

Standard of Review

Generally, final agency decisions are subject to judicial review pursuant to North Carolina's Administrative Procedure Act found in Chapter 150B of the General Statutes. N.C. Gen. Stat. § 150B-1 (2019). However, "Department of Commerce hearings and appeals authorized under Chapter 96" are exempt from Chapter 150B's contested case provisions. *Id.* § 150B-1(e)(20).

N.C. Gen. Stat. § 96-4(q) provides, "[t]he Board of Review . . . shall have the right and power to hold and conduct hearings for the purpose of determining the rights, status and liabilities of an employer" and "the power and authority to determine any and all questions and issues of fact or questions of law that may arise under the Employment Security Law" affecting the rights, liabilities, and status of an employer including the right to determine the amount of contributions an employer owes to the Division. N.C. Gen. Stat. § 96-4(q) (2019). A "decision or determination of the Board of Review upon such review in the Superior Court shall be conclusive and binding as to all questions of fact supported by any competent evidence." *Id.* Our standard of review is the same as the Superior Court's review of the Board's decision: "whether the facts found by the [Board] are supported by competent evidence and, if so, whether the findings support the conclusions of law." *Reeves v. Yellow Transp., Inc.*, 170 N.C. App. 610, 614, 613 S.E.2d 350, 354 (2005) (citations and quotation marks omitted). "Competent evidence is evidence

that a reasonable mind might accept as adequate to support the finding." *In re Adams*, 204 N.C. App. 318, 321, 693 S.E.2d 705, 708 (2010) (citation and quotation marks omitted). Moreover, the Board's findings are conclusive "even though the evidence might sustain findings to the contrary." *Brackett v. Thomas*, 371 N.C. 121, 126, 814 S.E.2d 86, 89 (2018) (citation and quotation marks omitted).

Analysis

I. Findings of Fact

[1] Appellant argues the Superior Court erred in concluding the Board's Findings of Fact were supported by competent evidence. The Superior Court concluded the Board did not err in "determining the weight and sufficiency of the evidence" and that there was competent evidence to support the Board's Findings. Therefore, we review the Board's Findings to determine whether the Record contained *any* competent evidence to support those Findings. N.C. Gen. Stat. § 96-4(q) (2019); *see also Reeves*, 170 N.C. App. at 614, 613 S.E.2d at 354.

Specifically, Appellant argues the following Findings were not supported by competent evidence: (A) Appellant controls the manner in which its workers complete the work and can discharge workers for adopting a different method; (B) workers did not have independent use of special skills, knowledge, or licenses; (C) workers were in Appellant's regular employ; (D) Appellant must have provided tools and equipment to its workers because Appellant maintained insurance for tools; and (E) workers did not perform a specified piece of work, make a profit or loss, or negotiate and set their own pay.

A. Control of the manner of work and ability to discharge workers

Appellant contends testimony at the hearing contradicts the Board's conclusion Appellant controlled the method of work and retained the authority to discharge workers. It is true there is some evidence in the Record to support Appellant's position. For example, Foshie testified he would not go to tradeshows to direct or manage the work crews. Foshie testified he "might come in after" to ensure the clients were satisfied with the product. Further, when asked whether a worker could be discharged for adopting one method of work or another, Foshie responded: "No. That is not my concern. . . . the only thing I'm concerned about is the outcome of it." Sworn affidavits from some workers also tend to corroborate Foshie's assertion workers could not be fired in the middle of a job.

However, there is also evidence in the Record to support the Board's Findings. *See Brackett*, 371 N.C. at 126, 814 S.E.2d at 89. As part of the Division's investigation, Foshie responded to and signed an Employment Security Questionnaire stating he tells workers what to do, how to do it, and could discharge workers as he sees fit. Moreover, the Record contains other questionnaires from workers who stated they felt as if they were employees and could not complete jobs in any way they saw fit. Thus, there is evidence in the Record to support the Board's Findings.

B. Workers' use of independent knowledge, skill, or licenses

Appellant further contends Foshie's testimony at trial contradicts the Board's Finding workers did not have use of independent knowledge, skill, or licenses in completing the work. Foshie testified workers could not "come in off the street" and complete the tasks required. Moreover, certain tasks and trades—rigging and forklift operation—required licensure and certification. Foshie testified even the "construct and deconstruct" crews, without any special licenses or certifications, required "talent" to complete the jobs assigned them.

However, the Record also contains evidence some workers did not use independent or special knowledge, skill, or licenses to complete their work. In Foshie's first signed ESQ, he answered "N/A" to the question asking if workers had licenses or permits and "must be able to work" to the question as to whether workers had independent use of special skills, knowledge, or training. Moreover, at least three workers answered the same questions in the negative. These workers also stated Foshie and other "bosses" showed them how to complete their tasks. Thus, again, there is evidence in the Record supporting the Board's Finding.

C. Workers were in Appellant's regular employ

Appellant argues the Board "grasped" to find Appellant's workers were in Appellant's regular employ. Appellant highlights the Board's citation to evidence one worker "performed additional services [outside of the tradeshow setting] for the employer." Moreover, Appellant argues work is performed on a temporary and sporadic basis and workers do not work for Appellant outside of the tradeshow setting.

However, the Board's Finding is supported with substantial other evidence Appellant does not mention. The Board acknowledged workers did not have written contracts with Appellant, but Appellant "communicated its expectations to workers and required workers to report to jobs at a specific time, place, and person." The Board stated, although the work was

done on a part-time basis, workers were regularly employed by Appellant when available. Moreover, the Board pointed to evidence Appellant's clients did not seek out any of these workers individually and always contacted Appellant to provide crews. The Board also cited Appellant's general liability and workers' compensation policies for four to eight "employees." Thus, we conclude the Board's Finding is supported by evidence in the Record.

D. Providing tools and equipment for workers

Appellant further submits the Board's Finding Appellant provided tools for workers was not supported by competent evidence. Again, Appellant posits the Board "grasped" at evidence of Appellant's tool insurance policy to infer Appellant provided tools to its workers. Appellant points to "overwhelming" evidence—in workers' statements and affidavits—workers provided their own tools. According to Appellant, the Board made an impermissible inference based solely on the insurance policy.

The specific Finding challenged by Appellant was actually part of the Board's broader Finding the workers were not engaged in their own independent business and that workers did not independently use their own special knowledge or skill on jobs. However, the Board in its Finding, acknowledged Appellant's workers supplied their own tools, while also inferring Appellant provided at least some tools based on Appellant's purchase of insurance coverage for tools. Even if this particular inference was improper, the mere fact workers, as found by the Board, provided their own hand tools, would not in and of itself be determinative under *Hayes*. *See Hayes*, 224 N.C. at 16, 29 S.E.2d at 140 ("The presence of no particular one of these indicia is controlling.").

Moreover, the broader Finding that workers were not engaged in their own businesses was supported by competent evidence. When asked whether he could name any of the individual workers' businesses, Foshie responded: "They don't have, most of these guys don't have names of businesses." Moreover, some of the workers—through questionnaires and affidavits—stated they did not have federal employee identification numbers, and one stated, "I felt like an employee. I wasn't my own boss . . . ."

E. Performing a specified piece of work; Profit or Loss; Setting Pay

Finally, Appellant contends the Board's Findings workers were not paid for performing a specified piece of work, did not realize a profit or loss, and did not set their own pay were not supported by competent evidence. Appellant notes the citations the Tax Opinion used to support

these Findings merely point to evidence workers preferred "flat bid" jobs and that Appellant would negotiate pay rates on the workers' behalf.

However, Foshie testified he paid the workers overtime for periods of work over eight hours in a twenty-four-hour period, and travel expenses including hotel rooms. Moreover, multiple worker affidavits—even those stating the workers considered themselves contractors—stated most jobs were paid on an hourly basis. In fact, Foshie testified workers merely preferred the flat bid jobs because the workers could get jobs done quickly regardless of the money paid. The Record also indicates Appellant paid workers for extraneous travel expenses and overtime. Moreover, even where workers objected to pay rates on particular jobs, Appellant negotiated the pay rate with its clients. Thus, the Record supports the Board's Findings Appellant's workers did not perform a specified piece of work, realize profit or loss, and were not able to set their own pay.

At best, Appellant establishes there was conflicting evidence on all these Findings. However, it was the Board's duty to resolve these conflicts in the evidence. *See Brackett*, 371 N.C. at 126, 814 S.E.2d at 89. As discussed, the Record does contain competent evidence to support the Board's Findings. Thus, the Superior Court did not err in determining the Board's Findings were supported by competent evidence.

II. Application of the *Hayes* Factors

[2] Appellant further contends the Superior Court erred in concluding the Board correctly applied the law in applying the *Hayes* factors and in concluding Appellant's workers were employees; and, therefore, Appellant was liable for employment security contributions.

As noted above, our Supreme Court laid out the determinative common law factors in *Hayes*. According to the *Hayes* Court, an independent contractor is one who:

> (a) is engaged in an independent business, calling, or occupation;
>
> (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work;
>
> (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis;
>
> (d) is not subject to discharge because he adopts one method of doing work rather than another;

(e) is not in the regular employ of the other contracting party;
(f) is free to use such assistants as he may think proper;
(g) has full control over such assistants; and
(h) selects his own time.

See Hayes, 224 N.C. at 16, 29 S.E.2d at 140. "[N]o particular one of these indicia is controlling. Nor is the presence of all required. They are considered along with all other circumstances to determine whether in fact there exists in the one employed that degree of independence necessary to require his classification as independent contractor rather than employee." *Id*. The parties in this case agree the *Hayes* factors and analysis applies to these proceedings before the Board.

Here, the Board made Findings of Fact supporting conclusions Appellant's workers were not independent contractors based on each of the *Hayes* factors.[3] Accordingly, the Board concluded, as a matter of law, the Division correctly issued the Tax Assessment to Appellant, and Appellant was an employer liable for unemployment insurance contributions.

However, Appellant specifically argues the Superior Court erred in determining the Board correctly applied the law when it concluded: (A) workers were not engaged in an independent calling; (B) workers were in Appellant's regular employ; (C) workers did not select their own time under *Hayes*; and (D) Appellant exercised the right to control the manner and details of the work performed.

A. Independent Calling

Appellant argues the Division misapplied the law by concluding workers were not engaged in an independent calling or business because the Division ignored the fact that workers were sole proprietors.

The Board supported its conclusion by finding workers did not have their own businesses, did not advertise their services, did not carry their own insurance, and did not have federal employer identification numbers. Appellant cites *McCown v. Hines* to support its contention the law does not require such formalities in order to be a sole proprietor; and, thus, an independent contractor. 353 N.C. 683, 549 S.E.2d 175 (2001).

3. Appellant contends the Division erroneously requires that each of the *Hayes* factors be established before an entity may be deemed an independent contractor. However, our review of the Record indicates the Board itself did not apply such a requirement, and instead merely weighed the evidence presented on each factor.

Although the *McCown* Court held a roofer, hired by an individual to repair a roof, did not need all these formalities to be a sole proprietor and independent contractor, the Court explained this was because the roofer was hired for his *expertise* as a roofer. *Id.* at 687, 549 S.E.2d at 178. In fact, the cases Appellant cites holding workers were engaged in independent callings each involved workers who had expertise in, or licenses or certifications for, particular professions. *See, e.g.*, *Hayes*, 224 N.C. 11, 29 S.E.2d 137 (skilled electricians); *McCown*, 353 N.C. 683, 549 S.E.2d 175 (a person hired specifically for his expertise in roofing); *Rhoney v. Fele*, 134 N.C. App. 614, 518 S.E.2d 536 (1999) (a registered nurse); *Gordon v. Garner*, 127 N.C. App. 649, 493 S.E.2d 58 (1997) (a truck driver with a commercial driver's license).

Here, however, as the Board noted, Appellant's workers were not licensed and had no particular expertise. Further, the Board found, "workers were not engaged in independent businesses, callings or occupations . . . performed part-time work for the employer[,]" and that no profit or loss could be realized by the workers. Moreover, the workers could complete their tasks after general direction and without "specialized skills" requiring "formal training." Indeed, in one affidavit a worker described himself as a "jack of many trades." Accordingly, the Board's Findings supported its conclusion workers were not engaged in an independent calling or business.

B. Regular Employ

Appellant further contends the Record reflects the work done by its workers was "sporadic" and, thus, the Division misapplied the law by concluding workers were in Appellant's regular employ.

In *Hayes*, electricians were hired to do an "extra" job outside of their regular employment with Duke Power. 224 N.C. at 18, 29 S.E.2d at 141. The electricians were free to decide when to do the work when they had time, but this sporadic work was a part of the one project on which they agreed to work. *Id.* Appellant cites our decision in *Rhoney v. Fele* for the proposition "sporadic" work done by a nurse—*engaged in an independent calling*—coordinated by a nurse-finding agency did not satisfy the regular employment *Hayes* factor. 134 N.C. App. 614, 518 S.E.2d 536.

However, here, the Board did not characterize the work as "sporadic." The Board characterized the work as "part-time" and workers were employed when Appellant had work and the workers were available. Further, the Board found Appellant instructed the specific

time, place, and person to which the workers were to report for work. Moreover, the nature of the work—unlike the specialized, licensed nursing or electrical work—was itself part-time and relatively unskilled, rather than sporadic work done by someone with an independent calling. *See, e.g.*, *Hayes*, 224 N.C. at 18, 29 S.E.2d at 141 ("[workers] were skilled electricians[.]"; *Rhoney*, 134 N.C. App. at 618, 518 S.E.2d at 540 ("as a registered nurse, [the worker] was engaged in an independent profession[.]"). As the Board found: Appellant was not merely a "middleman" for an entity needing a specialized worker; Appellant hired workers to complete jobs it contracted with clients to complete. *See Rhoney*, 134 N.C. App. at 619, 518 S.E.2d at 540 ("Thus, Nursefinders' role was similar to that of a broker or other middleman."). Thus, the Board's Findings supported its conclusion workers were in Appellant's regular employ.

C. Workers selecting their own time

Next, Appellant argues the Division misapplied the law by concluding the workers could not set their own time for working because they were able to accept or reject jobs as they saw fit.

Again, the *Hayes* Court concluded the electricians were free to determine when to complete the contracted work—outside of their regular employment duties with Duke Power—when they had extra time to work. 224 N.C. at 18, 29 S.E.2d at 141. In this case, workers could accept or reject entire projects; however, if they accepted a project they had to report at a specific time and place and to specific people for work. Within that particular job, the workers could not set their own hours.

Appellant cites *Rhoney* for the proposition the ability to accept or reject a job tends to support an independent contractor status. *Rhoney*, 134 N.C. App. at 619, 518 S.E.2d at 540. However, the *Rhoney* court also stated the nurse's inability to set his or her time once the nurse accepted a particular job cut against an independent contractor status. *Id.* Here, the Board found Appellant's workers were free to reject or accept specific projects; however, once on a project, workers could not choose the hours they worked. Therefore, as in *Rhoney*, the facts in this case cut both ways.

Appellant also cites *Gordon v. Garner* where we held a commercial truck driver was an independent contractor where he was free to accept or reject any delivery but had no discretion as to what he did with the load once he accepted a delivery. 127 N.C. App. 649, 659, 493 S.E.2d 58, 64. However, again, the commercial truck driver engaged in an independent calling and contracted for discrete deliveries with other

businesses. Appellant's workers, unlike the truck driver in *Gordon*, agreed to work on multi-day projects, made up of numerous individual tasks. Accordingly, the Board's Findings supported its conclusion the workers could not set their own working times.

D. Controlling the manner and details of work

Finally, Appellant argues the Division misapplied the law by concluding Appellant controlled the manner and details of the work when Appellant was not generally on site directing the work. Again, we disagree.

The *Hayes* Court held discussing specific details "before the work was begun . . . related to the general nature of the work" failed to show "the right to control the details of the work" sufficient to establish an employer-employee relationship. *Hayes*, 224 N.C. at 18, 29 S.E.2d at 142. Indeed, the *McCown* Court held the customer's direction that the roofer use certain mismatched shingles and where to place the shingles did not show the customer retained the right to control the manner and details of the work—the customer did not tell the roofer how many nails to put in each shingle or how far to overlap the shingles. *McCown*, 353 N.C. at 688, 549 S.E.2d at 178. Appellant contends, like these cases, it was only concerned with the end product and whether its clients were satisfied by the work.

However, the Board found—supported by affidavits and questionnaires, including one signed by Foshie—workers received on-the-job training as to how to do the work. Indeed, Foshie stated no person could "come in off the street" and do these jobs. Foshie, or someone employed by Appellant, gave at least some of the workers on-the-job training on how to do some of the work required. Unlike in *Hayes* and *McCown*, Appellant did exercise some control over how the work was done and not merely the end result. Therefore, the Board's Conclusion Appellant controlled the manner and details of the work was supported by its Findings.

Thus, we conclude the Board's Conclusions as challenged by Appellant are supported by the Board's Findings of Fact. Moreover, when considered along with the Board's additional Conclusions as to the remaining *Hayes* factors, the Board did not err in concluding Appellant's workers were employees and Appellant was liable for employment security contributions. Consequently, the Superior Court did not err in concluding the Board correctly applied the *Hayes* factors to the facts of this case.

Conclusion

For the foregoing reasons, the Superior Court properly affirmed the Board's Tax Opinion. Accordingly, we, in turn, affirm the Superior Court's Order.

AFFIRMED.

Judges BRYANT and DIETZ concur.

STATE OF NORTH CAROLINA
v.
JONATHAN CONLANGES BOYKIN

No. COA19-686

Filed 15 December 2020

1. Motor Vehicles—speeding to elude arrest—operating a motor vehicle—motion to dismiss—sufficient evidence

In a prosecution for felony speeding to elude arrest where "operating a motor vehicle" was an essential element of the crime and mopeds were specifically excluded from the statutory definition of "motor vehicle", the State presented sufficient evidence of that element to survive defendant's motion to dismiss where the arresting officer, despite repeatedly referring to defendant's vehicle as a moped during his testimony, stated that the vehicle operated by defendant was traveling at 50 mph, and also testified that the definition of "moped" excludes vehicles capable of going over 30 mph.

2. Motor Vehicles—speeding to elude arrest—jury instructions—failure to instruct on definitions of "motor vehicle" and "moped"

In a prosecution for felony speeding to elude arrest where "operating a motor vehicle" was an essential element of the crime and mopeds were specifically excluded from the statutory definition of "motor vehicle," the trial court committed plain error by failing to instruct the jury on the definitions of "motor vehicle" and "moped." Because the arresting officer repeatedly referred to defendant's vehicle as a "moped" and—where "moped" was statutorily defined as a vehicle incapable of going over 30 mph on level ground—he did not lock in a speed on radar or state whether the vehicle was being operated on level ground, failure to instruct on the definitions

of "motor vehicle" and "moped" likely misled or misinformed the jury and had a probable impact on the jury's finding that defendant was guilty.

3. Sentencing—habitual felon status—underlying felony conviction vacated—new trial

Where defendant's conviction for felony speeding to elude arrest was vacated for a new trial, his conviction for attaining the status of habitual felon based on that felony was also vacated for a new trial.

Appeal by defendant from judgments entered 12 June 2018 by Judge Ebern T. Watson III in Superior Court, Sampson County. Heard in the Court of Appeals 18 February 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State.

Gilda C. Rodriguez, for defendant-appellant.

STROUD, Judge.

Defendant was found guilty by a jury of felony speeding to elude arrest, felony habitual driving while impaired and two counts of attaining the status of habitual felon, one based on the speeding to elude arrest conviction and one based upon the habitual driving while impaired conviction. Defendant's appeal focuses on the judgment convicting him of felony speeding to elude arrest and because the jury was not instructed on the definition of an essential element of the crime of speeding to elude arrest and the evidence on this issue was in conflict, defendant must receive a new trial for speeding to elude arrest. Accordingly, defendant must also receive a new trial on the count of attaining the status of habitual felon which was based upon the felony speeding to elude arrest conviction. Further, we remand defendant's judgment for habitual impaired driving and the attaining of habitual felon status conviction, based upon habitual impaired driving, for resentencing and clarification.

I. Background

The State's evidence showed that in mid-May 2015, Patrol Officer Christopher Hardison of the Sampson County Sheriff's Office heard a radio communication about "a moped[.]" Officer Hardison then saw a man later identified as defendant riding a moped and followed him. The speed limit was 55 mph, and Officer Hardison testified that he

"clocked [the moped] at 50 miles per hour" but failed to "lock this speed in[.]" The speed limit then changed to 35 mph, and Officer Hardison testified the moped was still going 50 miles per hour. Officer Hardison turned on his blue lights to stop the moped for speeding, but it did not stop. The driver of the moped made several turns and ran three stop signs. Much of the chase was recorded. Later that day, the moped was spotted next to a "residence." Officers found defendant nearby and arrested him.

When defendant was arrested, he smelled of alcohol and had red glassy eyes and slurred speech. Defendant refused to submit any field sobriety tests and to provide a breath sample. Officer Hardison obtained a search warrant for a blood sample from defendant. Defendant was combative during the blood draw and had to be restrained. The results of the blood test showed a blood alcohol level of 0.19. During defendant's trial, the jury was informed of defendant's prior convictions, including impaired driving. Defendant was found guilty of felony speeding to elude arrest, habitual driving while impaired, and two counts of attaining the status of habitual felon -- one count based upon the conviction for eluding arrest and one based on the conviction for habitual impaired driving. Ultimately, the trial court entered judgment on the convictions for eluding arrest and habitual impaired driving, but entered only the count of attaining the status of habitual felon as related to the eluding arrest felony. Defendant appeals.

II. Felony Speeding to Elude Arrest

Defendant makes two arguments on appeal arising from the definition of a "motor vehicle" for a speeding to elude arrest conviction.

> The essential elements of misdemeanor speeding to elude arrest under section 20–141.5(a) are: (1) operating a motor vehicle (2) on a street, highway, or public vehicular area (3) while fleeing or attempting to elude a law enforcement officer (4) who is in the lawful performance of his duties. N.C. Gen. Stat. § 20–141.5(a).

State v. Mulder, 233 N.C. App. 82, 89, 755 S.E.2d 98, 103 (2014). Additionally, two aggravating factors raise the misdemeanor of speeding to elude arrest to a felony. *See id.* For purposes of this appeal, we note that the essential four elements are the same for both misdemeanor and felony speeding to elude arrest. *See generally id.*

A. Motion to Dismiss

[1] We begin with defendant's last issue in his brief. At the close of the State's evidence, defendant moved to dismiss the charges against him

because "the State has [not] carried its burden in this particular matter[.]" The trial court denied the motion. Thus, we turn first to defendant's last argument on appeal. Defendant contends "the trial court erred when it denied . . . [his] motion to dismiss the charge of felony speeding to elude arrest because the evidence was insufficient to support the necessary element that . . . [he] was operating a 'motor vehicle.' " (Original in all caps.)

> The proper standard of review on a motion to dismiss based on insufficiency of the evidence is the substantial evidence test. The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If there is substantial evidence of each element of the charged offense, the motion should be denied.

State v. Key, 182 N.C. App. 624, 628-29, 643 S.E.2d 444, 448 (2007) (citations and quotation marks omitted). "When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

The State agrees with defendant that operating a "motor vehicle" is an essential element of the crime of felony speeding to elude arrest. Again,

> [t]he essential elements of . . . speeding to elude arrest under section 20–141.5(a) are: (1) operating a motor vehicle (2) on a street, highway, or public vehicular area (3) while fleeing or attempting to elude a law enforcement officer (4) who is in the lawful performance of his duties. N.C. Gen. Stat. § 20–141.5(a).

Mulder, 233 N.C. App. at 89, 755 S.E.2d at 103. Defendant correctly notes a "moped" is specifically excluded from the statutory definition of a "motor vehicle[.]" *See* N.C. Gen. Stat. § 20-4.01(23) (2015).[1] Defendant's offenses occurred in May of 2015, when North Carolina General Statute § 20-4.01(23) defined a "motor vehicle" as "[e]very vehicle which is

1. The statutes regarding the definitions of "motor vehicle" and "moped" have since been amended several times. *See generally* N.C. Gen. Stat. Ch. 20 (2019).

self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. *This shall not include mopeds as defined in G.S. 20-4.01(27)d1*." *Id.* (emphasis added). At the time of defendant's offenses North Carolina General Statute § 20-4.01(27)d1 defined a "moped" as "[d]efined in G.S. 105-164.3." N.C. Gen. Stat. § 20-4.01(27)d1 (2015).

North Carolina General Statute § 105-164.3(22) defined a "moped" in May of 2015 as "[a] vehicle that has two or three wheels, no external shifting device, and a motor that does not exceed 50 cubic centimeters piston displacement and cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface." N.C. Gen. Stat. § 105-164.3(22) (Supp. 2014). Thus, the statutory definition of a "moped" requires evidence of a vehicle with all the following characteristics:

> (1) two or three wheels,
>
> (2) no external shifting device, and
>
> (3) a motor which
>
> > (a) does not exceed 50 cubic centimeters piston displacement, and
> >
> > (b) cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface.

See id.

As a general rule, "[t]he state is not called on to prove the negative." *State v. Glenn*, 118 N.C. 1194, 1195, 23 S.E. 1004, 1005 (1896). But in this particular case, the statutory definition of "motor vehicle" has a negative embedded within it since it excludes "mopeds." *See* N.C. Gen. Stat. § 20-4.01(23). Defendant argues the State was required to prove a negative and the motion to dismiss should have been granted because the State did not prove defendant's vehicle was *not* a moped. The State contends it was required to prove only that defendant was operating a "motor vehicle" and defendant would have the burden of proving the exclusion; in other words, defendant would have to argue sufficient evidence that his vehicle was actually a moped as defined by statute as a defense. Indeed, despite the wording of the statute, the State is required to prove an affirmative: that defendant was operating a "motor vehicle." *See Mulder*, 233 N.C. App. at 89, 755 S.E.2d at 103. Thus, to survive a motion to dismiss, the State was required to present evidence that the vehicle defendant was operating was a "motor vehicle," defined as "[e]very vehicle which is self-propelled[,]" but excluding mopeds. N.C.

Gen. Stat. § 20-4.01(23). There is no dispute that the vehicle defendant was operating was self-propelled, and thus we turn to the evidence of "mopeds[.]" *Id.*

Defendant contends that his vehicle was excluded from the statutory definition of "motor vehicle" because it was a "moped," which is specifically excluded by North Carolina General Statute § 20-4.01(23). *See id.* But the State's burden of proof was not to present evidence that defendant's vehicle was a "moped;" its burden was to present evidence defendant was operating a "motor vehicle" and the State's evidence met this burden, so the trial court correctly denied defendant's motion to dismiss. *See generally id.*

Defendant's argument is based primarily on the State's use of the word "moped" to describe his vehicle. At trial, the State consistently referred to defendant's vehicle as a "moped." The State's primary witness, Officer Hardison, used the word "moped" over 50 times in his testimony, referring to defendant's vehicle.[2] But the word "moped" as used in the vernacular is not as technical as the statutory definition. *See generally* N.C. Gen. Stat. § 105-164.3(22). Since the statute defines the term "moped," that definition controls, despite the vernacular understanding of what a "moped" is. *See generally id.*

> In the construction of any statute, including a tax statute, words must be given their common and ordinary meaning, nothing else appearing. *Where, however, the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be.* The courts must construe the statute as if that definition had been used in lieu of the word in question. If the words of the definition, itself, are ambiguous, they must be construed pursuant to the general rules of statutory construction, including those above stated.

Appeal of Clayton-Marcus Co., Inc., 286 N.C. 215, 219–20, 210 S.E.2d 199, 202–03 (1974) (emphasis added) (citations omitted).

The "ordinary meaning" of "moped" generally does not take into account the nature of the "shifting device" or "piston displacement," and Officer Hardison was using the word in the ordinary sense in his

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2. At one point in Officer Hardison's testimony, he stated the speed of 50 miles per hour would make the vehicle a "motorcycle," but unfortunately, Officer Hardison and the State's counsel persisted in using the term "moped."

testimony. N.C. Gen. Stat. § 105-164.3(22). Despite Officer Hardison's use of the word "moped," where a statute defines a word, the court is required to use the statutory definition. *See Clayton-Marcus Co., Inc.*, 286 N.C. at 219–20, 210 S.E.2d at 202–03. Although it is odd that the State identified the vehicle defendant was operating as a "moped" before the jury over 50 times and now argues before this Court that defendant's conveyance was a "motor vehicle, not [a] moped," the use of the word "moped" in evidence is not conclusive. *See generally id.* The better practice would certainly be for the State and its witnesses to use the statutory term applicable to the crime, here "motor vehicle." *See Mulder*, 233 N.C. App. at 89, 755 S.E.2d at 103.

Officer Hardison acknowledged that a "moped" could not be a "motor vehicle" during direct examination, but despite the use of the word "moped" the State's evidence did not clearly establish that defendant's vehicle was a "moped" which would be excluded under the statutory definition. Officer Hardison testified: "I activated my blue lights due to the fact that this vehicle was running 50 in a 35, as well as I could obviously tell this was a moped, which is a vehicle that should not have been traveling more than 30 miles per hour because a vehicle traveling at 30 miles per hour as a motor vehicle is anything above 30 miles per hours" and

> [i]n reference to a moped, a moped by the state statute cannot exceed 30 miles per hour. So if it was manufactured as a moped and any -- for any reason or any kind of alterations that could have been done to increase that speed from 31 to whatever it may be, which in this case was 50, that changes the classification of that moped from a vehicle, which is the same thing as a bicycle, a lawnmower, et cetera, it changes that classification to a motor vehicle which requires a valid driver's license, insurance to be on that vehicle, as well as registration to be on that vehicle. Which a vehicle, a moped in itself, at this time did not require any of that.

The testimony continued,

> Q. But for a legal classification, you're saying it goes from a vehicle to a motor vehicle?
>
> A. That's correct.
>
> Q. And in this case, specifically, when it's not a car, it doesn't make it a car, does it?

> A. No. It makes it a motorcycle. Once it goes from the -- beyond the 30 miles per hour, once it hits 31 miles per hour and above, it changes the classification to a motor vehicle which is -- in turn, makes this, with two wheels, a motorcycle.

On cross-examination, Officer Hardison again stated that a moped, as defined by North Carolina General Statute § 105-164.3(22) would not be able to go over 30 miles per hour unless it had been altered. The maximum speed of the vehicle is one element of the definition of a moped, *see* N.C. Gen. Stat. § 105-164.3(22), and thus a moped should not be able to go as fast as 50 miles per hour on a level surface. Officer Hardison did not testify if the road was level where he clocked defendant at 50 miles per hour. Viewed in the light most favorable to the State, as we must for purposes of a motion to dismiss, *see Miller*, 363 N.C. at 98, 678 S.E.2d at 594, the State's evidence showed defendant was operating a vehicle which outwardly appeared to be a moped but could go faster than a "moped" as defined by statute.

On appeal, the State contends it presented evidence defendant's vehicle was going faster than 30 miles per hour, so it met the definition of "motor vehicle" in as would be necessary for a conviction of felony speeding to elude arrest. *See Mulder*, 233 N.C. App. at 89, 755 S.E.2d at 103. All the State needed to show to survive the motion to dismiss on the element of "motor vehicle" was to present evidence that defendant was operating a "self-propelled" vehicle. *See* N.C. Gen. Stat. § 20-4.01(23). The State's evidence that the vehicle was going over 30 miles per hour could potentially exclude one of the elements of the definition of "moped," although the evidence was silent as to the gradient of the road when the speed was clocked. *See* N.C. Gen. Stat. § 105-164.3(22). Further, no evidence was presented regarding the "shifting device" or "piston displacement" in order to establish that the vehicle was a "moped." *Id.* Ultimately, the State's evidence met the elements of the statutory definition of a "motor vehicle," despite its repeated use of the term "moped," *see* N.C. Gen. Stat. § 20-4.01(27), and defendant's motion to dismiss the charge of felony speeding to elude arrest was properly denied. *See generally Mulder*, 233 N.C. App. at 89, 755 S.E.2d at 103.

B. Jury Instructions

[2] Defendant also contends "the trial court committed plain error when it failed to instruct the jury on the definition of 'motor vehicle,' which is an essential element of speeding to elude arrest." (Original in all caps.) Defendant notes he did not object to the jury instructions and thus argues for plain error review.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted).

Defendant contends,

> Had the trial court explained the legal definition of "motor vehicle" to the jury, there is a reasonable probability that the jury would not have convicted Mr. Boykin of felony speeding to elude arrest. The State's evidence that was presented to the jury was that Mr. Boykin was driving a moped when Officer Hardison chased him on May 15, 2015. Although Officer Hardison stated that he believed Mr. Boykin was driving at a speed in excess of 30 miles per hour, he also stated that he failed to lock Mr. Boykin's speed with the RADAR device he had that night. Moreover, there was no evidence of modifications made to Mr. Boykin's moped that would have enabled it to travel the speed Officer Hardison alleged and possibly have disqualified it as a moped. Lastly, the only source of information the jury had on what constituted a motor vehicle was from Officer Hardison, the State's witness, who may not have been completely accurate or thorough in his explanation. In other words, the impartial law on what could be characterized as a motor vehicle was absent from the jury's deliberation. In light of the evidence, it was reasonably probable that the jury would have reached a different verdict on the speeding to elude arrest offense. The trial court, therefore, committed plain error when it failed to define a motor vehicle for the jury and Mr. Boykin should receive a new trial.

Thus, using much of the same law as in his argument regarding the motion to dismiss, defendant contends had the jury been properly instructed as to the full definition of a "motor vehicle" and the excluded vehicle, a

"moped," the jury would have reached a different result because it would have determined he was operating a "moped" and not a "motor vehicle." *See generally* N.C. Gen. Stat. §§ 20-4.01(27); 105-164.3(22). Defendant cites to *State v. Rhome*, wherein this Court found plain error when the trial court failed to instruct on an essential element of a crime. *See State v. Rhome*, 120 N.C. App. 278, 294, 462 S.E.2d 656, 667–68 (1995) ("It is well established that the defendant in a criminal action has a right to a full statement of the law from the court. Failure to specifically charge the jury on every element of each crime with which the defendant is charged is not error per se, requiring reversal, but reversal is mandated in such a case if the jury consequently falls into error. Thus, in instructing the jury, the trial court must correctly declare and explain the law as it relates to the evidence. Moreover, the rule that instructions are to be confined to the issues applies in criminal cases. Instructions must be tailored to the charge and the indictment, and adjusted to the evidence. Accordingly, the jury charge must relate each and every essential element as alleged in the indictment." ((citations, quotation marks, and brackets omitted)).

Further,

> [t]he question of whether a trial court erred in instructing the jury is a question of law reviewed *de novo*. The standard of review set forth by this Court for reviewing jury instructions is as follows:
>
> > This Court reviews jury instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. McGee, 234 N.C. App. 285, 287, 758 S.E.2d 661, 663 (2014) (citations, ellipses, and brackets omitted). Defendant notes that Officer Hardison testified the moped was going in excess of 30 miles per hour, but he also admitted he had failed to lock in the speed on the RADAR device. In addition, Office Hardison did not describe the gradient of the roadway; even the statute recognizes that a moped may be able to go over 30 miles per hour downhill. *See generally* N.C. Gen. Stat. § 105-164.3(22).

The State's primary argument on appeal is that it is extraordinarily difficult for defendant to prevail under the plain error standard of review because defendant must demonstrate the jury would probably have reached a different result. We note this issue would likely have been avoided if the State had simply referred to the defendant's vehicle as anything but a "moped," the type of vehicle specifically excluded under the definition of "motor vehicle." *See* N.C. Gen. Stat. § 20-4.01(27). The State now contends,

> Given the unequivocal and [uncontradicted] testimony by Officer Hardison that he clocked the defendant at 50 miles per hour on radar, there can be no doubt that the defendant's vehicle met the definition of motor vehicle, not moped, since the officer's reading on radar was 50 miles per hour, which is not close to 30 miles per hour.

But there is some doubt. Even the fact noted as dispositive here by the State – speed – is not conclusive as there was no testimony that the surface was level. *See* N.C. Gen. Stat. § 105-164.3(22). In addition, the definition of "moped" includes elements other than speed. *See id.*

Properly instructed, a jury could have determined based on the evidence that defendant was not operating a "motor vehicle" but instead was operating a "moped." *See* N.C. Gen. Stat. §§ 20-4.01(27); 105-164.3(22). Often, due to the substantial evidence in trial, it is obvious that any errors in instructions had little or no probable impact on the jury's verdict, but that is not the case here. The State consistently and repeatedly used the term "moped" to describe defendant's vehicle, but the trial court did not instruct the jury on the definition of "motor vehicle" and the specific exclusion of a "moped" from that definition.

We conclude that without any instructions regarding the definition of "motor vehicle," including the statutory exclusion of a "moped," it "was likely that, in light of the entire charge," the jury was "misled or misinformed[,]" *McGee*, 234 N.C. App. at 287, 758 S.E.2d at 663, particularly since the State's evidence used the word "moped" to describe defendant's vehicle. We further conclude that "the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Defendant must receive a new trial on the speeding to elude arrest charge.

[3] Without the speeding to elude arrest conviction, defendant's conviction for attaining the status of a habitual felon based on that felony must be vacated for a new trial. *See generally State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977) ("Being an habitual felon is not a crime but

is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence. The habitual criminal act does not create a new and separate criminal offense for which a person may be separately sentenced but provides merely that the repetition of criminal conduct aggravates the guilt and justifies greater punishment than ordinarily would be considered." (citation, quotation marks, and ellipses omitted)).

Defendant makes two other arguments on appeal. The first argument is a double jeopardy issue regarding the felony speeding to elude arrest that he requests we invoke Rule 2 to consider. We decline to do so at this time as double jeopardy is a protection against twice being convicted or punished for the same offense, *see generally* U.S. Const. amend. V; N.C. Const. art. I, § 19, and defendant is now receiving a new trial for one of the convictions he contends is at issue. The remaining argument is as to a clerical error regarding the punishment class for the judgment for habitual impaired driving, and the State concedes this judgment may contain an error. We remand the habitual impaired driving judgment and remand for the trial court to address the clerical error on appeal and also the attaining the status of habitual felon conviction based upon the underlying felony of habitual impaired driving upon which defendant was convicted but, per our record, judgment was never entered upon nor arrested.

III. Conclusion

Defendant must receive a new trial on the charge of felony speeding to elude arrest and attaining the status of habitual felon conviction based on that charge. This result leaves intact the habitual impaired driving conviction and the habitual felon status based upon that conviction but due to the clerical error and the lack of any judgment regarding the habitual felon status conviction based upon the habitual impaired driving, we remand for the trial court to address the punishment class and both charges. In summary, we vacate the judgment in 15CRS50192 (speeding to elude arrest and habitual felon) for a new trial, and we remand for resentencing in file number 15CRS051148 (habitual impaired driving and habitual felon).

NEW TRIAL in part and REMANDED.

Judges INMAN and YOUNG concur.

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